



International Economic Law

Sessions 4-6

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Dispute Settlement System in the WTO

From the dispute settlement system under the GATT 1947 to the WTO

- Shortcomings of the GATT panels

➔ How the WTO dispute settlement system remedied the most important shortcoming under the 1947 GATT dispute settlement system?

- The WTO dispute settlement system is governed by the Dispute Settlement Understanding (DSU)

WTO dispute settlement system - evaluation



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There is no question that the WTO's dispute settlement system has been a success. The numbers tell their own story about how valued it has become. In just under 20 years since the system came into being, 482 requests for consultation have been received. In 47 years under the GATT, 300 disputes were received. And in 68 years the International Court of Justice has received 162 cases. So we have seen a remarkable level of activity. (Statement by Director-General Roberto Azevêdo (September 2014))

'Success' by reference to trust and support in the system

The WTO Appellate Body

'There are . . . a number of viewpoints expressed by governments and non-government observers that suggest a general sense of satisfaction with the dispute settlement system. That has led to the suggestion that there does not exist a strong political incentive to reform the system. Indeed, . . . an important underlying concern is, or should be, to not 'do any harm' to the existing system since it has so many valuable attributes.'

(Report by the Consultative Board to the former Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) para 254)

“[W]e have concluded that his performance does not reflect the role assigned to the Appellate Body by Members in the DSU.”

“[T]he U.S. position on this issue is not one based on the results of those appeals in terms of whether a measure was found to be inconsistent or not... Instead, the concerns raised are important, systemic issues that go to the adjudicative approach and proper role of the Appellate Body and the dispute settlement system.”

(Statement by the United States at the Meeting of the WTO Dispute Settlement Body, 23 May 2016)



Since 11 Dec 2019

Appellate Body has stopped functioning

WTO Dispute Settlement System in Crisis

Statements by the United States at the WTO General Council Meeting (October 2019)

“[T]he fundamental problem is that the Appellate Body is not respecting the current, clear language of the DSU. ...By denying that they are concerned about persistent rule-breaking by the Appellate Body, some WTO Members seek to avoid the deeper question: why did the Appellate Body feel free to **disregard the clear text of the agreements?**”

“Another cause could be that some WTO Members believe that the Appellate Body is an “international court” and its members are “judges” who inherently have more expansive authority than is provided in the DSU... It is also possible that some explanations for why the Appellate Body felt free to **depart from the clear text of the DSU** may be specific to the concerns that have been raised. ... For example, Article 17.5 of the DSU could not be more clear or categorical that appellate reports must be issued within 90 days. While the DSB minutes record that some WTO Members raised concerns about the Appellate Body’s **exceeding 90 days**, particularly without even consulting the parties, the minutes also record a few Members excusing the breach of our agreed rules.”

WTO Dispute Settlement System in Crisis

United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020)

“For more than 20 years, successive Administrations and the U.S. Congress have voiced significant concerns that the Appellate Body has failed to function according to the rules agreed by the United States and other WTO Members ... Unfortunately, the conduct of the Appellate Body has converted the WTO from a forum for discussion and negotiation into a forum for litigation. President Trump is committed to a trade agenda that benefits all Americans, and a reassessment of the WTO and its role is a key part of that agenda.”

WTO Dispute Settlement System in Crisis

“Disregard the clear text of the agreements” - Need for evolutive interpretation of WTO law

- ▶ WTO covered agreements were signed in 1994 – 26 years old
- ▶ They do not fully reflect social and technological advancement and contemporary needs

WTO Dispute Settlement System in Crisis

“Depart from the clear text of the DSU” – but quality, cost-efficiency and promptness need to be balanced

Statement by Prof. Giorgio Sacerdoti (a former member of the Appellate Body)

“Often it is said that there are three values to be pursued in any adjudicatory system domestic or international in order to render it effective, respected and qualitatively valuable. But that you cannot have together all the three, you can have just two at the same time, with choices having to be made. One is the quality of the adjudication (the outcome)...Then you have the promptness of decision-making. ...And the third is cost efficiency. if you don't want to increase the costs and nor to renounce to the quality of the process and of the outcomes, then you can't have at the same time speedy justice. This is probably what happens now: decisions require more time than envisaged in the DSU due to the number and complexity of cases submitted to the panels and the AB.”

Dispute Settlement System in the WTO

The jurisdiction of the WTO DS system

Three characteristics:

- (1) compulsory
- (2) exclusive
- (3) only contentious (i.e. not advisory)

1. Compulsory jurisdiction

- ▶ The responding member must accept the jurisdiction of the WTO DS system.

Art 6.1 DSU

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel

WTO dispute settlement system

The jurisdiction of the WTO DS system

2. Exclusive jurisdiction

- A complaining member is obliged to bring any dispute arising under the covered agreements to the WTO DS system.
- Covered agreements - Appendix 1 to the DSU

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods

Annex 1B: General Agreement on Trade in Services

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

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WTO dispute settlement system

2. Exclusive jurisdiction (cont.)

Article 23.1

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

► Measures subject to WTO DS

- (a) Any act or omission
- (b) Legislation 'as such'
- (c) Discretionary legislation
- (d) Measures by regional or local authorities (Article 22.9 DSU)

WTO dispute settlement system

Access to the WTO dispute settlement system

- ▶ Each covered agreement contains one or more **consultation** and **dispute settlement** provisions
- ▶ The consultation and DS provisions of most other covered agreements incorporate, by reference, Articles XXII and XXIII of the GATT 1994.

Art XXIII: 1 of the GATT 1994

1. 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

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

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.

WTO dispute settlement system

Access to the WTO dispute settlement system

- ▶ Art XXIII: 1 provides three types of complaint:
 - (1) 'violation' complaints;
 - (2) 'non-violation' complaints;
 - (3) 'situation' complaints.
- ▶ For (1)-(3), 'nullification or impairment of any benefit accruing to it directly or indirectly under this agreement' is required
- ▶ Unique characteristics of the WTO dispute settlement: its scope is broader (non-violation complaints) and narrower (nullification or impairment is required) than other international adjudicatory systems
- ▶ Difference between violation complaints and non-violation complaints: assumption of nullification or impairment of a benefit

WTO dispute settlement system

Indirect access to the WTO dispute settlement system

- ▶ Only WTO members have access to the WTO dispute settlement system – no direct access by companies, industry associations or NGOs
- ▶ Yet companies, industry associations and NGOs have roles to play in WTO dispute settlement:
 - (a) They are the ‘driving force’
 - (b) They play the so-called ‘behind-the-scenes’ role



- ▶ ‘Indirect’ access to the WTO dispute settlement system

WTO dispute settlement system

Key Features of WTO dispute settlement

1. Objects and purposes

Article 3.2 and 3.3 DSU

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

WTO dispute settlement system



1. Objects and purposes

- ▶ The importance of the WTO dispute settlement system - US-Section 301 Trade Act (2000): protection of the security and predictability of the multilateral trading system

2. Single, comprehensive and integrated system

- ▶ DSU provides for a single dispute settlement system for disputes arising under any of the covered agreements
- ▶ Special and additional rules/procedures provided in each covered agreement (if any) prevail over DSU

WTO dispute settlement system

3. Different methods of dispute settlement

- ▶ Consultations (Art 4)
- ▶ Adjudication (Arts 6-20)
- ▶ Arbitration (Art 25)
- ▶ Good offices, conciliation and mediation (Art 5)

WTO dispute settlement system

4. Remedies for breach

- (a) The withdrawal (or modification) of the WTO-inconsistent measure
- (b) Compensation and suspension of concessions or other obligations ('retaliation'): they are not alternative remedies but only temporary remedies

Art 22.1 DSU:

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

WTO dispute settlement system

(a) The withdrawal (or modification) of the WTO-inconsistent measure

Art 3.7 DSU

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.

Article 19.1 DSU

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

WTO dispute settlement system

- (a) The withdrawal (or modification) of the WTO-inconsistent measure
- ▶ The recommendations under Article 19.1 DSU are legally binding on the relevant Member
 - ▶ If it is impracticable to comply immediately with the recommendations and rulings (this may often be the case), pursuant to Article 21.3 of the DSU, a reasonable period of time is allowed



WTO dispute settlement system

(a) The withdrawal (or modification) of the WTO-inconsistent measure

Article 21.3

3. At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

- (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,
- (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,
- (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that **the reasonable period of time to implement** panel or Appellate Body recommendations **should not exceed 15 months** from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.



WTO dispute settlement system

(a) The withdrawal (or modification) of the WTO-inconsistent measure

- ▶ 15 months as a mere guideline for the arbitrator
- ▶ Factors to be considered for the determination of the period for implementation
 - Changes in legislation required?
 - The domestic political or economic situation? In cases of developing-country members? See Art 21.2 DSU

(b) Compensation

- ▶ Hardly used

(c) Retaliation

- ▶ When possible?
- ▶ What is 'cross-retaliation'?

WTO dispute settlement system

Institutions of WTO dispute settlement

1. Political institutions

- ▶ DSB – *alter ego* of the WTO's General Council
- ▶ Decisions are taken by **consensus**.
- ▶ Exceptions: a **'reverse'** or **'negative'** **consensus** for some key decisions

E.g. Art 17.14 of the DSU

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

WTO dispute settlement system

Institutions of WTO dispute settlement

2. Judicial-type institutions

(a) Ad hoc panels

- ▶ Established each time to hear a particular dispute
- ▶ Dissolved once they have accomplished this task
- ▶ The panel request must: (1) indicate whether consultations were held; (2) identify the specific measures at issue; and (3) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly (Art 6.2 DSU)
- ▶ Normally composed of three persons (Article 8.5 DSU)
- ▶ Panelists are subject to the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Rules of Conduct, WT/DSB/RC/1)



WTO dispute settlement system

Institutions of WTO dispute settlement

2. Judicial-type institutions

(a) Ad hoc panels

▶ Mandate of the panel

Article 11 (Function of Panels)

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

WTO dispute settlement system

Institutions of WTO dispute settlement

2. Judicial-type institutions

(a) Ad hoc panels

► Requirements of panel reports

Article 12.7 DSU

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out **the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes**. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

WTO dispute settlement system

Institutions of WTO dispute settlement

2. Judicial-type institutions

(b) Standing Appellate body

- ▶ Established in February 1995
- ▶ A permanent international tribunal, composed of seven judges ('Members of the Appellate Body')

Article 17.3

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

WTO dispute settlement system

Institutions of WTO dispute settlement

2. Judicial-type institutions

(b) Standing Appellate body

▶ Scope of appellate review

Article 17.6 of the DSU

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

▶ Mandate of the Appellate Body

Article 17. 12 and 13 of the DSU

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may **uphold, modify or reverse** the legal findings and conclusions of the panel.



WTO dispute settlement system

Institutions of WTO dispute settlement

2. Judicial-type institutions

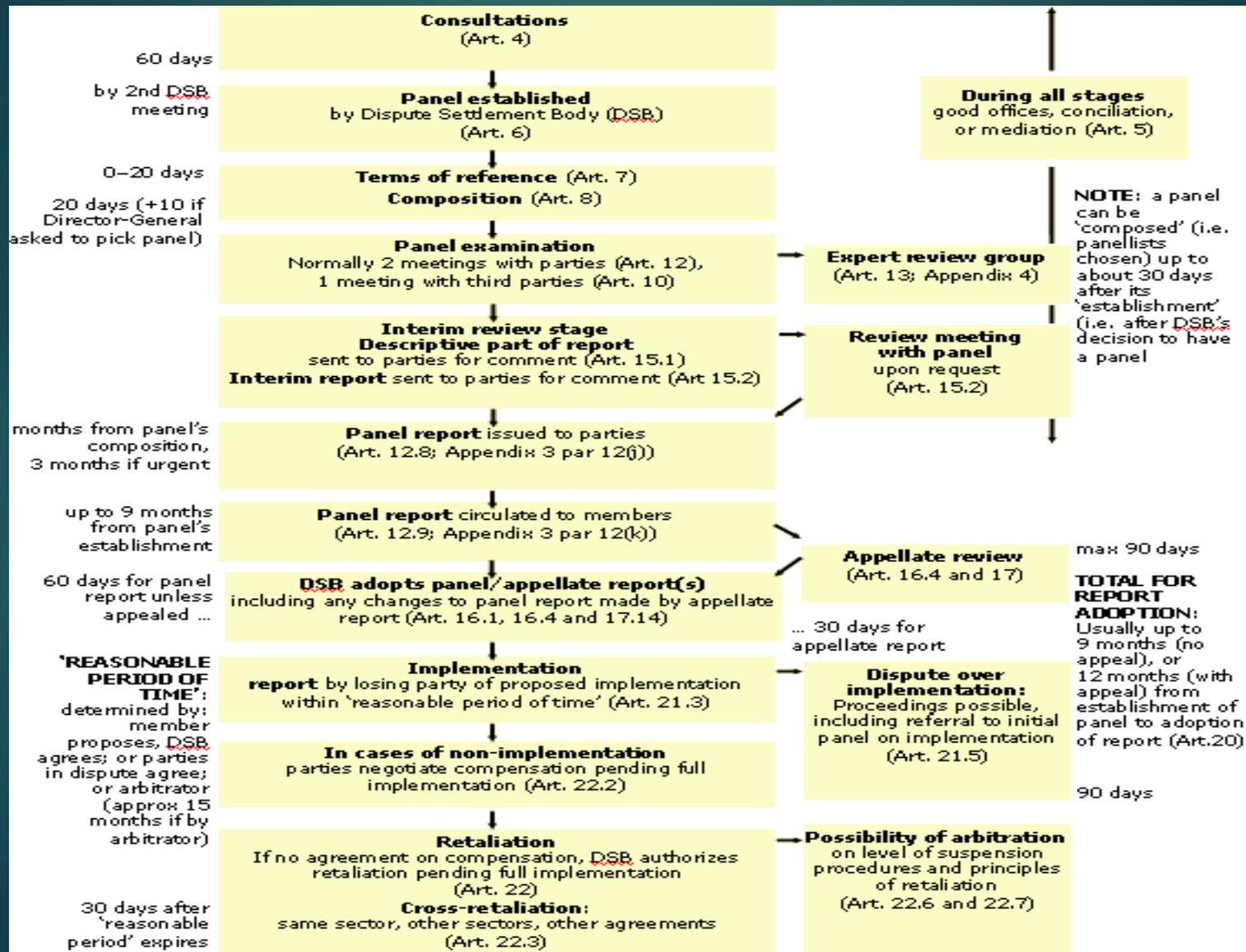
(b) Standing Appellate body

- ▶ No power to remand a dispute to the panel. Two choices left for the Appellate Body when reversing:

(1) To leave the dispute unresolved

(2) To go on to 'complete the legal analysis'

WTO dispute settlement system (www.wto.org)



WTO dispute settlement system

Process of WTO dispute settlement

1. Short timeframes
2. Confidentiality and transparency

(a) Panel

Appendix 3

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.
3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

WTO dispute settlement system

Process of WTO dispute settlement

1. Short timeframes
2. Confidentiality and transparency

(b) Appellate Body

Article 17.10

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

Art 18.2

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

WTO dispute settlement system

Process of WTO dispute settlement

1. Short timeframes
 2. Confidentiality and transparency
- (c) Exception: public observation of meetings
- (i) Panels

Art 12.1

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

- (ii) Appellate Body

US/Canada – Continued Suspension (2008)

WTO dispute settlement system

Process of WTO dispute settlement

3. Amicus curiae Briefs

4. Adoption or appeal of **panel** reports

- ▶ Within sixty days after the date of circulation of the panel report to the members, the report is adopted at a DSB meeting unless: (1) a party to the dispute formally notifies the DSB of its decision to appeal; or (2) the DSB decides by consensus not to adopt the report (Art 16.4)

5. Adoption of Appellate Body reports

- ▶ Within thirty days after the date of circulation of the panel report to the members, the AB report and the panel report as upheld, modified or reversed by the AB are adopted by the DSB unless the DSB decides by consensus not to adopt the reports (Art 17.14).

WTO dispute settlement system

Implementation and Enforcement

- ▶ The final stage of the process of WTO dispute settlement
- ▶ First step: within thirty days of the adoption of the panel and/or AB report, the Member concerned must inform the DSB of its intentions in respect of the implementation of the recommendations and rulings (Article 21.3)
- ▶ Step(s) to be followed: (1) arbitration on the 'reasonable period of time for implementation', (2) the surveillance of implementation by the DSB; (3) disagreement on implementation: and (4) arbitration on, and authorization of, suspension of concessions or other obligations

WTO dispute settlement system

Implementation and Enforcement

1. Arbitration on the 'reasonable period of time for implementation'
 - ▶ If it is impracticable to comply with the recommendations and rulings immediately, the member concerned has a reasonable period of time in which to do so (Article 21.3 DSU)
 - ▶ If no agreement on the period can be reached between the member concerned and the complainant(s) within 45 days of the adoption, the original complainant can refer the matter to arbitration (Art 21.3(c) DSU)
2. Surveillance of implementation by the DSB

WTO dispute settlement system

Implementation and Enforcement

3. Disagreement on implementation

- ▶ Disagreement as to the existence/consistency with WTO law of implementing measures - decided through DS.

Article 21.5 DSU

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

- ▶ Mandate of the compliance panel: to examine the consistency of the new/modified measure with the covered agreement

WTO dispute settlement system

Compensation or Retaliation

- ▶ If the respondent fails to implement the recommendations and rulings within the reasonable period of time (agreed or determined)
- 
- ▶ At the request of the complainant negotiation between the complainant and the respondent commences with a view to coming to an agreement on mutually acceptable compensation.
 - ▶ Retaliation - if satisfactory compensation is not agreed upon within 20 days of the expiry of the reasonable period of time, the complainant may request authorization from the DSB to suspend the application to the respondent of concessions or other obligations under the covered agreements
 - ▶ The DSB must decide on the authorization to retaliate within 30 days of the expiry of the reasonable period of time. It does so **by reverse consensus**
- 

WTO dispute settlement system

Compensation or Retaliation

- ▶ If the non-complying party objects to the level of suspension proposed, the matter may be referred to arbitration

Art 22.6

...if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

WTO dispute settlement system

Legal assistance for developing country members

- ▶ WTO Members can be assisted and represented by private legal counsel in WTO DS proceedings.
- ▶ EC-Bananas III (1997): 'that representation by counsel of a government's own choice may well be a matter of particular significance – especially for developing country members – to enable them to participate fully in dispute settlement proceedings.'



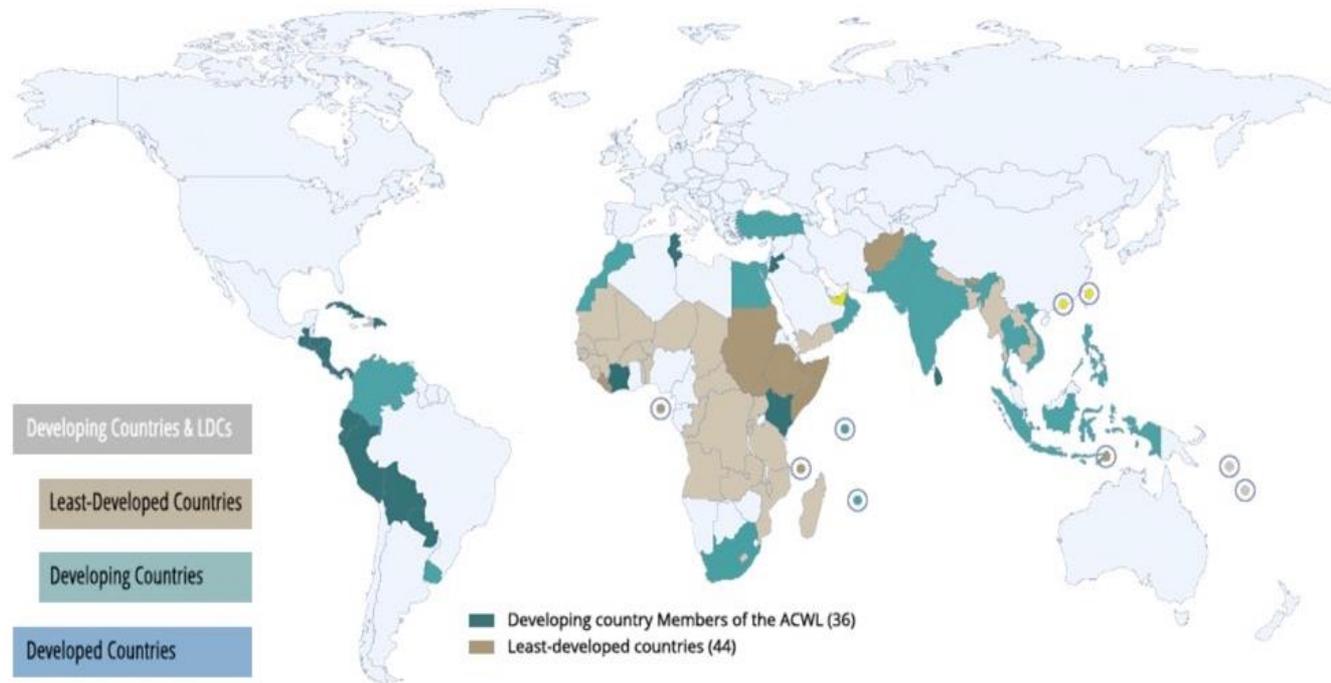
However,

- ▶ Issues of high costs – the need for legal assistance
 - (a) Article 27.2 DSU
 - (b) Need for a balance with the Secretariat's duty to be impartial
 - (c) **Advisory Centre on WTO Law (ACWL)**

Advisory Centre on WTO Law (ACWL) (<https://www.acwl.ch/>)

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- Dominican Republic
- Ecuador
- Guatemala
- Honduras
- Kenya
- Nicaragua
- Panama
- Paraguay
- Peru
- Tunisia
- Jordan (20 January 2002)
- El Salvador (3 September 2004)
- Sri Lanka (21 November 2008)
- Costa Rica (30 April 2009)
- Cuba (3 November 2013)
- Côte d'Ivoire (12 January 2017)

Advisory Centre on WTO Law (ACWL) (<https://www.acwl.ch/>)

Members entitled to the services of the ACWL (36)

CATEGORY A

- Hong Kong, China
- Chinese Taipei (13 May 2004)
- United Arab Emirates (29 April 2016)

CATEGORY B

- Bolivarian Republic of Venezuela
- Colombia
- Egypt
- India
- Pakistan
- Philippines
- Thailand
- Uruguay
- Oman (25 April 2003)
- Mauritius (11 June 2003)
- Turkey (17 August 2003)
- Indonesia (28 April 2004)
- Viet Nam (25 September 2009)
- Seychelles (27 March 2014)
- South Africa (28 April 2017)
- Morocco (13 June 2019)

Supplementary session: Arbitration under Article 25 DSU – a replacement?

Article 25 Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties. 2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

Arbitration under Article 25 DSU – a replacement?

- ▶ The disputing parties may depart from the DSU and agree on the rules and procedures they deem appropriate for the arbitration, including the selection of the arbitrators.
- ▶ Notification of their agreement to resort to arbitration to all (WTO) Members is necessary.
- ▶ Other Members may become party to an arbitration only with the agreement of the disputing parties.
- ▶ The parties to the arbitration must agree to abide by the arbitration award (Articles 25.2 and 25.3 of the DSU).

Arbitration under Article 25 DSU – a replacement?

- ▶ Article 25 could substitute the (now defunct) Appellate Body?
 - (a) Parties are willing to sign an arbitration agreement? (Arbitration does not have compulsory): when the prospects of outcome do not look good for a party, the party has no incentive to do so
 - (b) A possible way out – conclusion of a plurilateral general arbitration agreement?

Arbitration under Article 25 DSU – a replacement?

► Issues

1. Creating inconsistency and unpredictability
2. Arbitration rules need to be agreed on an ad hoc basis
3. Wouldn't be able to solve disputes involving the US