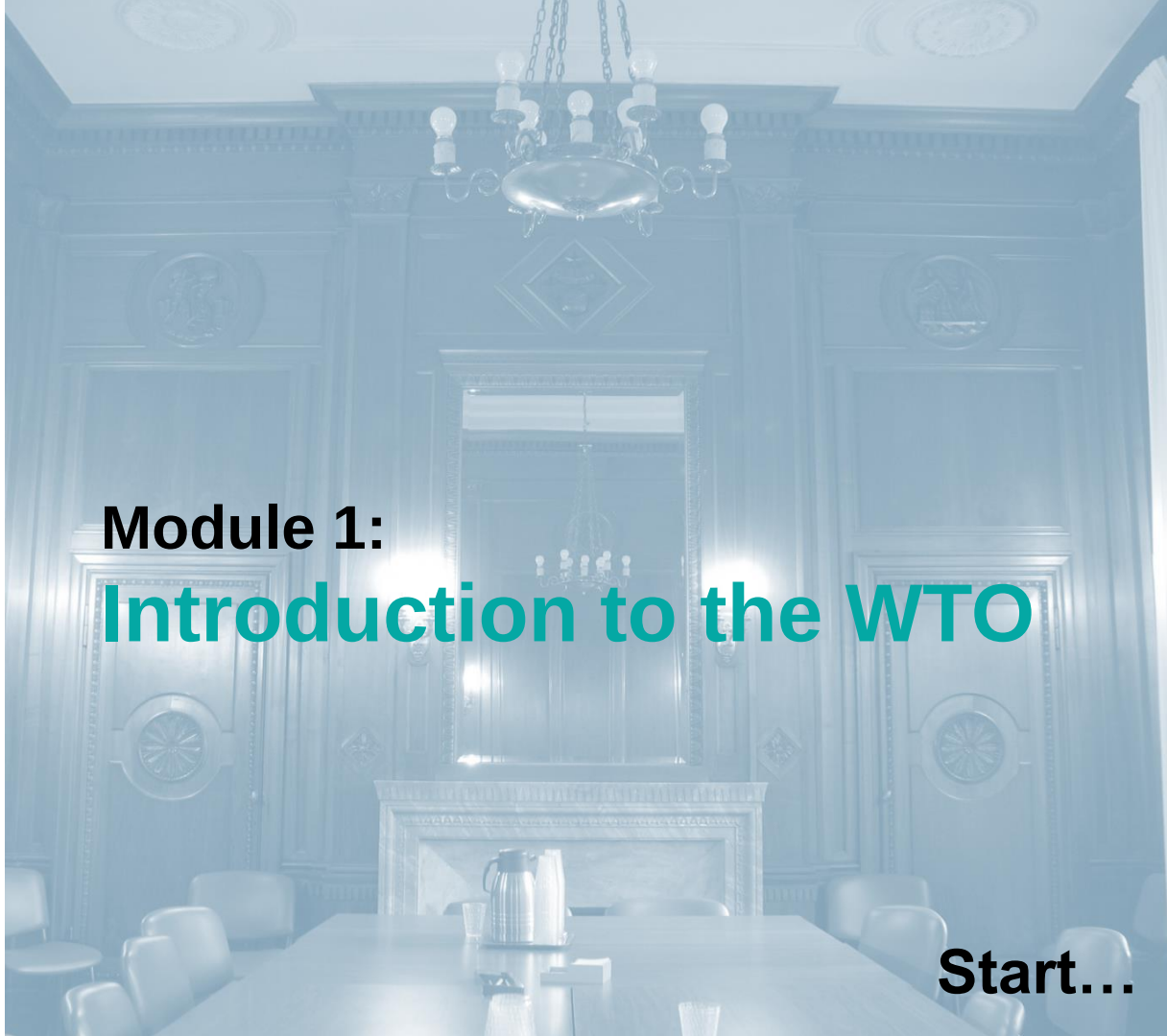
THE WTO DISPUTE SETTLEMENT SYSTEM

NEXT



Module 1:
Introduction to the WTO

WTO/OMC
E-LEARNING

Start…

Welcome & Objectives

Welcome to Module 1 on “Introduction to the WTO”! This module provides an overview of the WTO’s objectives, functions, decision-making rules, basic principles and main exceptions. **The objective of this module is to refresh the knowledge you acquired by studying the E-Learning course “Introduction to the WTO”, a necessary precondition for your study of this E-Learning course on the WTO Dispute Settlement System (DSS).**

Structure

This module is divided into **four lessons**:

Lesson 1

What is the WTO? What are its objectives and functions?

Lesson 2

How does the WTO work?

Lesson 3

Basic principles: What are the main WTO obligations on market access?

Lesson 4

Basic principles: What are the main exceptions to WTO obligations?

LESSON 1

What is the WTO? What are its objectives and functions?

I.A: Objectives of the WTO

Key provision:
Preamble to the WTO Agreement

The WTO is the only global organization dealing with the rules of international trade between nations. 160 governments are Members of the WTO. At its heart are the agreements, which were negotiated, signed and ratified by governments. In the preamble to the Marrakesh Agreement Establishing the WTO (the "WTO Agreement"), the parties to the Agreement recognize the objectives they wish to attain through the multilateral trading system:

- **Raise living standards**;
- **Ensure full employment**;
- **Ensure a large and steadily growing volume of real income and effective demand**; and
- **Expand the production of, and trade in, goods and services**, while allowing for the optimal use of the world's resources **in accordance with the objective of sustainable development**.

The WTO Agreement also recognizes the need for "positive efforts to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with … their economic development".

I.B: Functions of the WTO

The WTO…:

Key provision:
Article III of the WTO Agreement

- …provides a **forum for global trade negotiations**
- …is a **system of international trade rules**
- …**administers and monitors the WTO Agreement**
- …**provides a forum for settling trade disputes** among its Members
- …**cooperates with other international institutions**
- …**helps to enhance trade capacity in developing countries**

The E-Learning course on the WTO Dispute Settlement System (DSS) discusses one of the core functions of the WTO, namely to provide a forum for settling trade disputes among its Members.

I.B: Functions of the WTO

I.B.1: The WTO provides a forum for trade negotiations

The WTO provides a forum for negotiating global trade rules. Negotiations in the WTO are conducted directly by Member governments. The WTO was born out of negotiations and everything it does is the result of negotiations. **The purpose is to reduce trade barriers for the benefit of producers, exporters, importers and consumers; while allowing governments to meet legitimate policy objectives.** The bulk of the WTO's current work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently acting as a forum for negotiations under the Doha Development Agenda (DDA), launched in 2001.

WTO Members have placed the needs of developing and LDC Members at the heart of the Doha work programme. The developmental aspects of the Doha Round permeate all negotiating subject areas, which put special emphasis on the needs and interests of developing countries. The DDA includes negotiations on a wide range of trade issues including agriculture, market access for non-agricultural products, services, as well as dispute settlement provisions. Negotiations on dispute settlement aim at improving and clarifying the DSU. The DDA negotiations have yielded a "Transparency Mechanism for Regional Trade Agreements (RTAs)", and the so-called "Bali Package" of Ministerial Declarations and Decisions, which includes a Monitoring Mechanism on special and differential treatment (S&D), Decisions for least-developed Countries (LDCs), and an Agreement on Trade Facilitation!

I.B: Functions of the WTO

I.B.2: The WTO is a system of international trade rules

1: Which rules?

The WTO Agreement was concluded during the Uruguay Round. This "package" includes about 60 agreements and Decisions, as well as the original GATT 1947. Since 1994, negotiations have produced additional legal texts which have focused mainly on market access commitments (*). The conceptual structure is reflected in the way the legal texts are organized. **The WTO Agreement serves as an "umbrella agreement“: it sets up the legal and institutional foundations of the WTO. It includes four Annexes**:

(*) They include decisions on financial services, basic telecommunications, and maritime transport (under GATS), and information technology products (under GATT).

I.B: Functions of the WTO

Annex 1 is divided into three sections:

- Annex 1A: containing the revised General Agreement on Tariffs and Trade (GATT), the other agreements governing trade in goods, and a protocol which ties in individual countries' concessions on goods (schedules on goods).
- Annex 1B: the General Agreement on Trade in Services (GATS), texts on specific services, and individual countries' specific commitments (schedules on services) and exemptions.
- Annex 1C: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Annex 2

- Sets the rules and procedures for dispute settlement contained in the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU).

Annex 3

- Provides for regular reviews of developments and trends in national and international trade policy under the "Trade Policy Review Mechanism" (TPRM).

Annex 4

- Covers the Plurilateral Trade Agreements which are within the WTO framework but have a limited Membership (i.e. they only apply to those WTO Members that have accepted them).

I.B: Functions of the WTO

I.B.2: The WTO is a system of international trade rules

2: Based on which fundamental principles?

The WTO Agreements are based on a number of simple and fundamental principles:

Non-discrimination: Members shall not discriminate among their trading partners (most-favoured nation principle); or between national and foreign like products, services or nationals (national treatment principle).
More open trade: reducing or eliminating obstacles to trade.
Transparency and predictability: traders and Members need to know what the trade rules are around the world (transparency) and that trade measures will not be imposed arbitrarily (predictability).
Special treatment for less developed Members: least-developed Members face particular challenges when benefiting from trade liberalization; therefore, they have more time to adjust to the rules, greater flexibility and other special rights.

I.B: Functions of the WTO

I.B.2: The WTO is a system of international trade rules

3: Administered by whom?

The WTO facilitates the administration of the WTO Agreements. To this end, WTO Member governments meet regularly in the various WTO councils and committees to monitor the implementation of the Agreements. Monitoring is indeed one of the most intense areas of work in the WTO: WTO councils and committees consider information provided by the Members regarding their trade regulations and measures. WTO councils and committees serve as a forum for discussions where Members ask each other questions on various WTO-related issues.

WTO Members also review periodically each Member's trade policies and practices under the Trade Policy Review Mechanism (TPRM). These reviews allow the evaluation of individual Members' trade policies and practices and their impact on the multilateral trading system (MTS).

I.B: Functions of the WTO

I.B.3: The WTO provides a forum for settling trade disputes

Key provision:
Article III.3 of the WTO Agreement

The WTO's procedure for settling disputes is vital for enforcing the rules. By doing so, the WTO DSS underscores the rule of law and improves the stability and predictability of the MTS. A dispute commonly arises when a Member adopts a trade measure that one or more Members consider to be contrary to the obligations under the WTO Agreements. When Members are unable to agree on a solution, they can request a panel of independent experts to rule on the dispute. **The procedures for settling disputes are based on clearly-defined rules, which are embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).**

I.B: Functions of the WTO

I.B.4: The WTO cooperates with other international institutions

Key provision:
Article III.5 of the WTO Agreement

The WTO cooperates with other international institutions, such as the International Monetary Fund (IMF) and the World Bank, to achieve greater coherence in global economic policy-making. However, coherence in global economic policy-making goes well beyond the WTO's cooperation arrangements with the IMF and the World Bank. Indeed, the WTO maintains extensive institutional relations with several other international organizations. Some 140 international organisations have observer status in WTO bodies. The WTO also participates as observer in the work of several international organizations. **In all, the WTO Secretariat maintains working relations with almost 200 international organisations in activities ranging from statistics, research and standard-setting to technical assistance and training.** Although the extent of such cooperation varies, coordination and coherence between the work of the WTO and that of other international organizations continues to evolve so as to assist Members in the operation of their economic policies.

I.B: Functions of the WTO

I.B.5: The WTO helps to enhance trade capacity in developing countries and LDCs

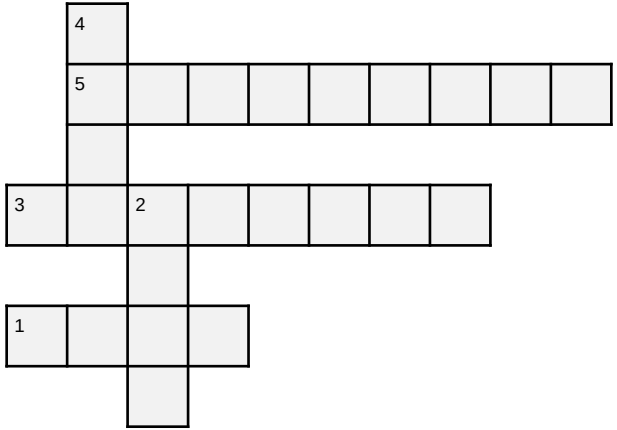
Key documents:
Doha, Hong Kong and Bali Ministerial Declarations

Technical assistance and capacity building are core elements of the WTO's work. More than two thirds of WTO Members are developing countries and LDCs. The WTO helps these Members to fully benefit from the MTS in various ways. The WTO Agreements contain special provisions for developing countries, including longer periods to implement their obligations and measures to increase their trading opportunities. The WTO also organizes hundreds of technical assistance activities every year to help these Members to better understand and implement WTO rules and to participate more effectively in its work. Capacity building also involves providing assistance to build the supply-side capacity and infrastructure needed in these countries to expand their trade.

Test your knowledge!

Can you find the words?

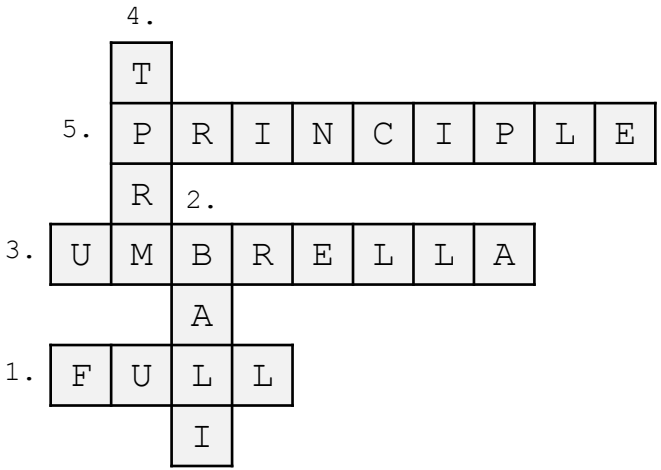
Definition
1. The employment that Members wish to attain through the WTO, as reflected in the preamble to the Marrakesh Agreement 2. The new “package” of ministerial declarations and decisions 3. The WTO Agreement, which includes four Annexes, is this type of agreement 4. The Trade Policy Review Mechanism (acronym) 5. Non-discrimination is a fundamental .... of the WTO



Test your knowledge!

Answer:

Definition
1. The employment that Members wish to attain through the WTO, as reflected in the preamble to the Marrakesh Agreement 2. The new “package” of ministerial declarations and decisions 3. The WTO Agreement, which includes four Annexes, is this type of agreement 4. The Trade Policy Review Mechanism (acronym) 5. Non-discrimination is a fundamental .... of the WTO



I.C: Takeaway messages from Lesson 1

Lesson 1 has discussed the following key points:

- The WTO is the only international organization dealing with the rules of global trade between governments. Its objectives are to:
  - Raise living standards;
  - Ensure full employment;
  - Ensure a large and steadily growing volume of real income and effective demand; and
  - Expand the production of, and trade in, goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.
- The WTO Agreement also recognizes the need for "positive efforts to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with … their economic development".
- The WTO:
  - …provides a forum for global trade negotiations
  - …is a system of international trade rules
  - …administers and monitors the WTO Agreement
  - …provides a forum for settling trade disputes among its Members
  - …cooperates with other international institutions
  - …helps to enhance trade capacity in developing countries

I.D: Suggested readings and resources

References for Lesson 1:

Legal documents:

- The Preamble of the Marrakesh Agreement Establishing the WTO: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

Introductory videos:

- The WTO in brief (video): http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm
- WTO at fifteen (video): http://www.wto.org/english/res_e/webcas_e/webcas_e.htm#video
- A virtual tour of the WTO (video): http://www.wto.org/english/forums_e/students_e/students_e.htm

Supplementary information:

- In brief - The WTO: past, present and future: http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm
- Understanding the WTO – Basics: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm

LESSON 2

How does the WTO work?

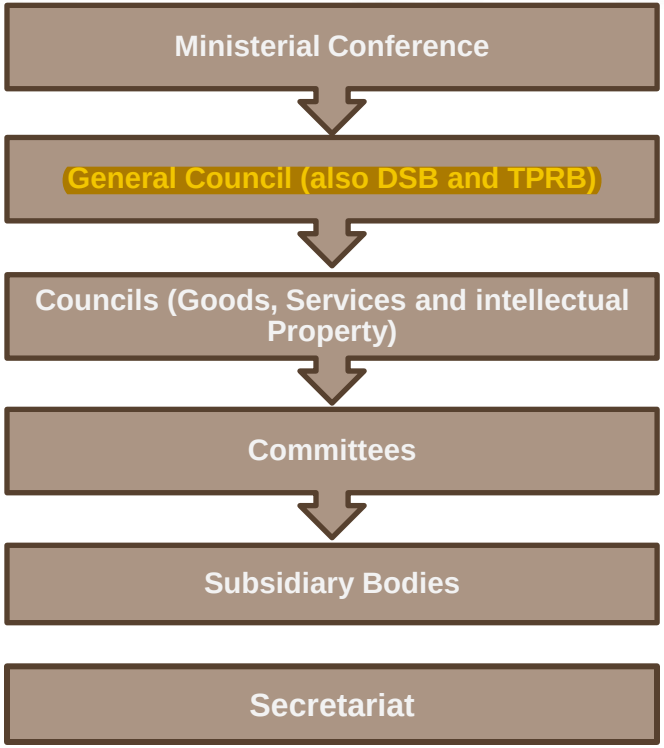
Introduction

The WTO is a "Member-driven" international organization. All decisions in the WTO are taken by its Members, normally by consensus. In the WTO, the Members take decisions in various councils and committees which generally consist of all WTO Members. These councils and committees meet regularly to monitor the implementation of WTO agreements and provide a forum for Members to discuss trade issues. The WTO also has a Secretariat composed of international officers who provide support to the WTO bodies.

This section will explain:

1. The institutional structure of the WTO
2. The decision-making process in the WTO

II.A: The institutional structure of the WTO



To see a more detailed WTO organizational chart:
http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm

II.A: The institutional structure of the WTO

Ministerial Conference

The Ministerial Conference is composed of representatives of all WTO Members and generally meets once every two years. It has the authority to take decisions on all matters under any of the Multilateral Trade Agreements, in accordance with the decision-making procedures contained in the WTO Agreement and in the relevant multilateral trade agreement(s).

General Council (also DSB and TPRB)

The General Council is also composed of representatives of all WTO Members, usually Ambassadors or Permanent Representatives, based in Geneva. It carries out the functions of the Ministerial Conference in the intervals between meetings of the Ministerial Conference.
The General Council meets regularly to carry out the functions assigned to it under the WTO Agreement. It has a Chairperson (a Member's representative, normally an Ambassador), who is elected by all the Members every year.
The General Council also meets as the Dispute Settlement Body (DSB) and as the Trade Policy Review Body (TPRB).

II.A: The institutional structure of the WTO

Councils (Goods, Services and intellectual Property)

Three Councils operate under the guidance of the General Council and are also open to all WTO Members:

- The *Council for Trade in Goods* oversees all the issues related to the WTO Agreements with respect to trade in goods. It supervises the work of the Committees responsible for specific areas, such as agriculture, market access, customs valuations, rules of origin, sanitary and phytosanitary measures, etc.).
- The *Council for Trade in Services* oversees all issues related to the General Agreement on Trade in Services (GATS). Like the Council for Trade in Goods, it has a number of subsidiary bodies.
- The *Council for Trade - Related Aspects of Intellectual Property Rights* (TRIPS) oversees all issues related to the TRIPS Agreement.

Committees

The Trade Negotiations Committee (TNC) was set up by the Doha Ministerial Declaration to oversee the negotiations mandated under the DDA. The TNC is chaired by the Director-General of the WTO. The TNC created a number of subsidiary negotiating bodies to handle different subjects that form part of the DDA, including the Special Sessions of various Committees or Councils that have a mandate to negotiate.

II.A: The institutional structure of the WTO

Subsidiary Bodies

Several other subsidiary bodies, which focus on horizontal issues, report to the General Council directly. They cover issues such as trade and environment, trade and development, regional trade agreements and the accessions of new Members. They are open to all WTO Members. The bodies that are of a permanent nature are normally called "Committees" or "Working Groups", while those established on a temporary basis are called "Working Parties".

Secretariat

The Secretariat is headed by the Director-General (DG), who is appointed by the Ministerial Conference. Since decisions in WTO are taken by Members only, the Secretariat has no decision-making power.

The Secretariat is located in Geneva and has around 700 staff members who are nationals of WTO Members. WTO staff members cannot seek or accept instructions from any government or any other authority external to the WTO in the discharge of their duties. The main duties of the Secretariat include providing support to the various councils and committees, technical assistance to developing countries and information to the public. The Secretariat also provides legal assistance in the dispute settlement process and advises governments wishing to become Members of the WTO.

II.B: Decision-making process in the WTO

Key provision:
Articles IX, X and XII of the WTO Agreement

Decisions in the WTO are taken through its councils and committees, whose membership consists of all WTO Members. **The WTO continues the GATT's tradition of taking 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 consensus is not possible, the WTO Agreement allows for voting. A vote is won with a majority of the votes cast, unless otherwise provided in the WTO Agreement. At meetings of the Ministerial Conference and the General Council, each WTO Member shall have one vote.

TIP!
Since decisions in the WTO are generally made by consensus (i.e. without voting), informal consultations play a vital role in bringing a diverse membership to an agreement. The chairperson of a negotiating group may attempt to bridge positions or to forge a compromise by holding consultations with delegations individually, or in smaller groups of interested delegations. The process must remain transparent to ensure that all Members are kept informed of progress in the discussions and inclusive so that all Members have an opportunity to participate or to provide input.

Test your knowledge!

Match the WTO bodies with their appropriate functions!

WTO bodies	Functions
Ministerial Conference	It oversees the Doha Development Agenda (DDA)
General Council	It oversees the administration of the Agreements covering trade in goods
DSB	Takes decisions when the top decision-making body is not in session
TNC	Takes decisions on behalf of all the Members
Council for Trade in Goods	It is in charge of administering the rules applicable to the settlement of trade disputes

Test your knowledge!

Answer:

WTO bodies	Functions
Ministerial Conference	It oversees the Doha Development Agenda (DDA)
General Council	It oversees the administration of the Agreements covering trade in goods
DSB	Takes decisions when the top decision-making body is not in session
TNC	Takes decisions on behalf of all the Members
Council for Trade in Goods	It is in charge of administering the rules applicable to the settlement of trade disputes

II.C: Takeaway messages from Lesson 2

Lesson 2 has discussed the following key points:

- The WTO is a “Member-driven” international organization. All decisions in the WTO are taken by its Members, normally by consensus.
- The WTO continues the GATT’s tradition of decision-making by consensus. Consensus is achieved if no WTO Member present at the meeting when the decision is taken formally objects to the proposed decision.
- The Ministerial Conference can take decisions on all matters under any of the Multilateral Trade Agreements, in accordance with the decision-making procedures contained in the WTO Agreement and in the relevant multilateral trade agreement.
- The General Council acts on behalf of the Ministerial Conference in the intervals between meetings of the Ministerial Conference.
- The TNC was set up by the Doha Ministerial Declaration to oversee the negotiations mandated under the DDA.
- Three Councils operate under the guidance of the General Council and are also open to all WTO Members: the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade - Related Aspects of Intellectual Property Rights.
- Informal consultations within the WTO play a vital role in bringing a diverse membership to an agreement.

II.D: Suggested readings and resources

References for Lesson 2:

Legal documents:

- The Preamble of the Marrakesh Agreement Establishing the WTO:
  http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

Supplementary information:

- To find more about WTO Ministerial Conferences:
  http://www.wto.org/english/thewto_e/minist_e/minist_e.htm
- To find out more about the General Council:
  http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm
- Understanding the WTO – Basics:
  http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm

LESSON 3

What are the basic principles of the WTO?

Introduction

The WTO facilitates the smooth flow of global trade through the administration of a rules-based system. These rules are contained in the WTO Agreement, which consists of several legal documents covering a wide range of trade-related issues. The WTO Agreement can be seen as a set of rights and obligations that apply to the Members of the WTO. The Agreement is based on a number of basic principles, which constitute the foundation of the MTS. **The basic principles of the WTO are**:

- **Non-discrimination (most-favoured nation and national treatment)**
- **More open and predictable trade**
- **Transparency**
- **Development dimension**

III.A: Non-discrimination principles

III.A.1: Most-favoured nation (MFN)

The MFN principle ensures non-discrimination *between* or among like products, and services and nationals with respect to the protection of intellectual property. If a Member grants an advantage to a product, service or a national from another WTO Member, it has to do the same with respect to like products, services or, for IP, nationals from all other WTO Members.

III.A: Non-discrimination principles

III.A.1: Most-favoured nation (MFN)

The MFN principle requires a WTO Member to accord to all WTO Members any advantage given to any other country (Member or not of the WTO). However, a WTO Member could give an advantage to other WTO Members, without having to accord the same advantage to non-Members (only WTO Members benefit from MFN treatment). The MFN principle ensures that WTO Members that may have less bargaining power are able to benefit from the best trading conditions resulting from the negotiations. It also reduces the transaction costs associated with market access. The MFN principle is subject to some important exceptions, which will be explained in Lesson IV.

For trade in goods (Article I of the GATT 1994), any advantage, favour or privilege granted by any Member to any product originated in or destined for any other country shall be accorded immediately and unconditionally to the "like product" originating in or destined for all other Members. The MFN principle covers a broad range of measures in relation to exportation and importation of goods, as well as internal measures. GATT/WTO case law has set up criteria for determining whether the imported and domestic products are "like products".

For trade in services (Article II of the GATS), the GATS requires WTO Members to extend immediately and unconditionally to services and services suppliers of any other Member treatment no less favourable than that accorded to "like services and services suppliers" of any other country. The MFN principle is applicable to any measure -- as defined in Article I of the GATS -- that affects trade in services in any sector falling under the Agreement, whether or not specific commitments have been undertaken. WTO Members are allowed to maintain measures inconsistent with the MFN principle if these were inscribed in a List of Article II-Exemptions annexed to their Schedules of specific commitments in services.

For TRIPS-related issues (Article 4 of the TRIPS Agreement), the MFN principle requires that, with regard to the protection of intellectual property, any advantage, favour, privilege or immunity given by a Member to the nationals of any other Member(s) shall be accorded immediately and unconditionally to the "nationals" (natural and juridical persons) of all other Members. This principle is common to all categories of intellectual property covered by the TRIPS Agreement.

III.A: Non-discrimination principles

III.A.2: National treatment

The national treatment principle ensures non-discrimination *between domestic and foreign* products, services and between foreign and domestic nationals with respect to the protection of intellectual property. In general, the national treatment principle prohibits a Member from favouring its domestic goods and services over the imported "like" goods and services from other Members, once the latter have entered the domestic market. The objective is to provide equality of competitive conditions between domestic and foreign producers and service providers. As with the MFN principle, there are also exceptions that apply to the national treatment principle, which will be explained in Lesson IV.

III.A: Non-discrimination principles

III.A.2: National treatment

For trade in goods (Article III of the GATT 1994), the national treatment principle prohibits a WTO Member from favouring its domestic products over a group of imported “like” products of other Members. The national treatment applies to internal measures, as opposed to border measures (e.g. tariffs). It covers internal taxation (e.g. sales tax, value added tax), and internal laws, regulations and requirements affecting the internal sale, transportation, distribution or use of products. Goods that can enter a Member's customs territory thanks to reduced border barriers should not be put in an uncompetitive position due to the application of internal measures.

In the area of services (Article XVII of GATS), the national treatment principle refers to non-discrimination between, on the one hand, domestically produced services or domestic service providers and, on the other hand, imported services or foreign service providers. The national treatment principle applies in the context of trade in services only to the extent that WTO Members have made explicit commitments. The GATS requires that, in scheduled sectors, services and service suppliers of any other Member are granted no less favourable competitive opportunities than those accorded to a Member's own "like services and services suppliers". Any departure from this rule would need to be inscribed as a limitation on national treatment in the Schedule of specific commitments of the Member concerned.

The TRIPS Agreement (Article 3) requires that each Member accord to the nationals of other Members treatment no less favourable than it accords to its nationals with regard to the protection of intellectual property. The exceptions to the national treatment principle allowed under the four pre-existing World Intellectual Property Organization (WIPO) Conventions (Paris, Berne Rome and IPIC*) are also allowed under the TRIPS Agreement. (*) Note: Treaty on Intellectual Property in Respect of Integrated Circuits.

III.B: More open and predictable trade

III.B.1: Trade in goods

Lowering trade barriers is one of the most obvious means of encouraging trade. Trade barriers include customs duties ("tariffs"), as well as import bans or quotas. However, there are also several other measures that could restrict or impede market access for goods and services. **WTO Members have recognized that the substantial reduction of tariffs and other barriers to trade, together with the non-discrimination principle, are key instruments to achieve the objectives of the WTO**. For instance, the main WTO provisions on market access for trade in goods cover:

- The progressive reduction and binding of tariffs
- The elimination of quantitative restrictions
- The reduction of other barriers to trade

III.B: More open and predictable trade

III.B.1: Trade in goods

The progressive reduction and binding of tariffs (Article II of the GATT 1994): Under the GATT/WTO, the use of tariffs is not prohibited; however, Members have committed to carry out multilateral negotiations periodically with a view to substantially reducing the general level of tariffs and other charges on imports and exports. WTO Members had also agreed to bind their tariffs at the reduced levels and to record such tariff bindings, together with other concessions, in their WTO Schedules of concessions. Members may apply a tariff which is lower than the "bound" level; however, they cannot exceed the bound levels specified in their Schedules of concessions. If a Member applies a lower tariff, it has to grant that benefit to all Members according to the MFN principle. Tariff bindings provide predictability and security with respect to market access for goods mainly through their inclusion in the Schedules, which are not easily changed. In order to modify their tariff concessions, a Member has to negotiate with other Members holding special rights.

The elimination of quantitative restrictions (Article XI of the GATT 1994): WTO Members cannot, as a general rule, apply quantitative restrictions (e.g. bans or quotas) on the goods imported from or exported to another Member. While tariffs are allowed as long as they do not exceed the scheduled bound levels and are applied on an MFN basis, quantitative restrictions are generally prohibited (quantitative restrictions impose absolute limits on imports, tariffs do not). Despite the general rule prohibiting quantitative restrictions, there are some exceptions which allow their imposition in certain circumstances. In those cases, quantitative restrictions must be applied on a non-discriminatory basis, according to Article XIII of the GATT.

Other barriers to trade: The progressive reduction of tariffs has given rise to other forms of measures restricting market access for goods and services and protecting domestic industries. In the WTO, a number of GATT provisions and Agreements on trade in goods set out specific disciplines on non-tariff measures (all measures other than tariffs that may restrict trade). In general, they impose disciplines on the application and administration of such measures so that they do not constitute unnecessary barriers to international trade. The agreements include, for example, the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures, the Agreement on Technical Barriers to Trade (TBT), the Agreement on Customs Valuation and the Agreement on Import Licensing Procedures.

III.B: More open and predictable trade

III.B.2: Trade in services

Key provisions:
Articles XVI and XVII of the GATS

As with Members' Schedules of tariff concessions for goods, each WTO Member is required under the GATS to submit a Schedule for trade in services. By scheduling commitments, a Member guarantees other Members minimum conditions of access on an MFN basis, comparable to a tariff binding under the GATT. Since these are ceiling bindings, Members are not prevented from being more 'generous' in practice. The GATS does not prescribe the sector scope or the level of liberalization. It is up to each Member to decide which sectors it wishes to open, the extent of market access being given in those sectors (e.g. whether any restrictions apply on foreign ownership), as well as any limitations on national treatment (e.g. whether some rights granted to local companies will not be granted to foreign companies).

Schedules may vary widely in terms of the sector scope and the level of commitments undertaken, reflecting Members' national policy objectives and constraints. Similarly to the Schedules on tariff concessions for goods, commitments in services can only be withdrawn or modified after negotiations and agreement on any compensatory adjustment with affected Members.

III.C: Transparency

Transparency obligations ensure that policies and regulations affecting trade are made accessible to governments and traders from all WTO Members. Transparency also has a systemic importance as it allows the monitoring of Members' trade measures and practices, and their impact on the MTS. Most WTO Agreements include transparency obligations. The general principle on transparency for trade in goods is set forth in Article X of the GATT 1994. **Transparency in the WTO can be characterized as "internal" or "external"**:

Internal transparency: keeping the WTO informed

- Review of Members' national trade policies through the Trade Policy Review Mechanism
- Domestic publication of Members' trade regulations
- Notification of Members' trade measures to the WTO
- Other transparency mechanisms

External transparency: keeping the public informed

- Initiatives and programmes aimed at informing the general public about WTO's activities.

III.D: Development dimension

Trade plays an important role in promoting economic growth and reducing poverty in the developing world. **More than two thirds of WTO Members are developing or least-developed countries (LDCs). The WTO Agreement, in its preamble and throughout its agreements, recognizes the particular situation of these countries, in particular by providing special and differential treatment (S&D) in favour of developing-country and LDC Members**. S&D provides special flexibilities or rights to developing countries and LDCs to help them benefit from trade liberalization and integrate into the MTS. It is considered a useful tool to address the economic and developmental asymmetries among Members.

III.D: Development dimension

The WTO addresses the special needs of developing countries and LDCs in the following ways:

S&D provisions in the form of special flexibilities or rights for developing countries and LDCs, which are spread across the WTO Agreement. For instance, they include longer periods for developing countries and LDCs to implement their obligations and measures to increase their trading opportunities.

Capacity building programmes such as Aid for Trade and WTO trade-related technical assistance (TRTA) activities are aimed at helping developing and least-developed country Members to participate in the WTO and to benefit from trade liberalization.

The Committee on Trade and Development (CTD), its Sub-Committee on LDCs and other subsidiary bodies are the focal points for the coordination of work related to trade and development in the WTO.

Test your knowledge!

Complete the following sentences with the corresponding WTO principle and its main elements.

1. The _____ principle ensures that Members do not discriminate between their trading partners. It applies with respect to _____ and _____.

2. According to _____ a Member that has agreed to bind its tariff for pianos at 10% cannot apply a higher tariff on pianos (e.g. 30%).

3. The _____ principle ensures that Members do not favour _____ products over the products imported from other Members. It applies with respect to internal taxes and _____.

4. _____ Members enjoy special flexibilities under the WTO Agreement, such as longer transitional periods to meet their obligations.

5. _____ is very important as it allows Member governments and traders to be informed about other Members' policies affecting trade. Based on this principle, each Member's trade policies are reviewed under the _____. Each Member is also informed about other Members' trade regulations through _____ to the WTO.

Test your knowledge!

Answer:

1. The **MFN** principle ensures that Members do not discriminate between their trading partners. It applies with respect to **imports** and **exports.**

2. According to **Art.II.1 GATT** a Member that has agreed to bind its tariff for pianos at 10% cannot apply a higher tariff on pianos (e.g. 30%).

3. The **NT** principle ensures that Members do not favour **domestic** products over the products imported from other Members. It applies with respect to internal taxes and **regulations.**

4. **Developing and least-developed** Members enjoy special flexibilities under the WTO Agreement, such as longer transitional periods to meet their obligations.

5. **Transparency** is very important as it allows Member governments and traders to be informed about other Members' policies affecting trade. Based on this principle, each Member's trade policies are reviewed under the **TPRM**. Each Member is also informed about other Members' trade regulations through **notifications** to the WTO.

III.E: Takeaway messages from Lesson 3

Lesson 3 has discussed the following key points:

- The basic market access principles of the WTO include: Non-discrimination (most-favoured nation and national treatment), more open and predictable trade, transparency and the development dimension.
- The MFN principle ensures non-discrimination between trading partners. If a WTO Member grants to a Member an advantage, it has to extend such advantage to all WTO Members.
- The national treatment principle ensures non-discrimination between domestic and foreign products, services or nationals with regard to the protection of intellectual property.
- WTO Members have recognized that the substantial reduction of tariffs and other barriers to trade, together with the non-discrimination principle, are key to achieving the objectives of the WTO.
- Each WTO Member is required under the GATS to submit a Schedule for trade in services. By scheduling commitments, a Member guarantees other Members minimum conditions of access on an MFN basis, comparable to a tariff binding under the GATT.
- Transparency obligations ensure that policies and regulations affecting trade are made accessible to governments and traders from all WTO Members. Transparency also has a systemic importance as it allows the monitoring of Members' trade measures and practices, and their impact on the MTS.
- More than two thirds of WTO Members are developing countries or LDCs. The WTO Agreement recognizes the particular situation of these countries and the link between trade and development by providing them special and differential treatment (S&D).

III.F: Suggested readings and resources

References for Lesson 3:

Main legal documents:

- Articles I, II and III of the GATT:
  http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleI

Supplementary information:

- Legal Underpinnings:
  http://www.swisslearn.org/wto/module3/e/start.htm
- Understanding the WTO – Principles of the system:
  http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.ht
- Understanding the WTO – Principles of the system:
  http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm
- WTO website – Who are developing members in the WTO?
  http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm
- Link to Understanding the WTO – developing countries:
  http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm
- List of LDC members:
  http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm
- WTO – website – Work programme on small economies
  http://www.wto.org/english/tratop_e/devel_e/dev_wkprog_smalleco_e.htm

LESSON 4

Basic principles: what are the main exceptions to WTO obligations?

Introduction

WTO Members may, in certain circumstances, deviate from their main obligations and apply trade restrictive measures, provided that they comply with certain conditions. Such trade restrictions are considered to serve legitimate objectives such as the protection of health or the environment. **The exceptions provide flexibility for the Members to meet their policy objectives. The main exceptions include**:

- General exceptions
- Regional trade agreements **(RTAs)**
- Enabling clause
- Trade remedies **(safeguard, CVD, AD)**
- Balance of payments
- Security exceptions
- Waivers

IV.A: General exceptions

Key provisions:
Article XX of the GATT 1994 and Article XIV of the GATS

The purpose of the general exceptions is to ensure that commitments undertaken by Members under the WTO Agreement do not hinder their pursuit of legitimate policy objectives. A WTO Member may invoke a general exception when one of its measures has been found to be inconsistent with a provision of the GATT 1994 or the GATS. **An exception may apply, for example, with regard to a measure that is necessary to protect human, animal or plant life or health, or that relates to the conservation of exhaustible natural resources.** The general exceptions allow Members to derogate from their WTO obligations provided that certain conditions are met.

IV.A: General exceptions

For trade in goods, the general exceptions are set forth in Article XX of the GATT 1994. Article XIV of the GATS provides similar exceptions applicable to trade in services. In order to be justified under one of these provisions, a measure must first meet the requirements of one of the sub-paragraphs of Article XX of the GATT 1994 or Article XIV of the GATS; and second, it must meet the requirements of the “chapeau” (or introductory paragraph) of the provision, namely that the measure does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

It is up to each WTO Member to set the policy objectives that it seeks to achieve and the level of protection that it wants to obtain. However, Members are bound to implement these objectives through measures that are consistent with the WTO rules. The “chapeau” of Article XX of the GATT 1994 and Article XIV of the GATS serves to ensure that Members’ right to avail themselves of the general exceptions is exercised in good faith.

IV.B: Regional trade agreements

Key provisions:
Article XXIV of the GATT 1994 and Article V of the GATS

Members are allowed to provide preferential treatment to their trading partners within a customs union or a free trade area (goods), or with regard to economic integration arrangements (services), without having to extend such treatment to all WTO Members, subject to certain conditions. The purpose of a customs union or a free trade area should be to facilitate trade among the parties to the RTA and not to raise barriers to the trade with other WTO Members. The Agreement provides internal and external conditions to RTAs. These agreements shall be in line with the objectives of the MTS, and not constitute obstacles to trade. Other requirements comprise provisions on interim agreements and transparency provisions.

IV.B: Regional trade agreements

For trade in goods, Article XXIV of the GATT 1994 provides the legal basis for RTAs while economic integration agreements on trade in services are subject to Article V of the GATS. In addition, the Enabling Clause (paragraph 2c) allows developing country Members to conclude agreements on trade in goods among themselves, subject to more flexible requirements than those contained in Article XXIV of the GATT 1994. The Transparency Mechanism for RTAs applies to all RTAs, whether notified under the GATT, the GATS or the Enabling Clause.

IV.C: The “Enabling Clause”

Key legal instrument:
Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903)

The Enabling Clause constitutes an S&D provision, which aims at increasing the commercial opportunities for developing and LDC Members. It authorizes developed-country Members to grant enhanced market access to products from developing countries, without having to give such ‘differential and most favourable treatment’ to other Members. **In that sense, the Enabling Clause operates as an ‘exception’ to the MFN treatment obligation in Article I:1 of the GATT 1994, which normally requires that such treatment be extended to all Members ‘immediately and unconditionally’.**

IV.C: The “Enabling Clause”

The Enabling Clause applies, for instance, to preferential tariff treatment accorded by developed-country Members to products originating in developing countries under their respective Generalized System of Preferences (GSP) schemes (Paragraph 2(a)). A developed-country Member may grant additional preferential treatment to some, and not to other, developing country Members, as long as the additional preferential tariff treatment is available to all similarly-situated developing-country Members, that is, to all those that have the development, financial and trade needs to which the preferential treatment is intended to respond. The preferences granted are subject to the Transparency Mechanism for Preferential Trade Arrangements (PTAs). The Enabling Clause also allows developing country Members to conclude (reciprocal) trade agreements on trade in goods among themselves, without having to extend such treatment to other WTO Members, subject to certain requirements (Paragraph 2(c)).

IV.D: Trade remedies

WTO Members are allowed to apply trade defence mechanisms to remedy a situation of unfair trade practices (anti-dumping and countervailing measures) or a surge of imports (safeguard measures). In general, these remedies may be applied when (dumped/subsidized/increased) imports are causing, or threatening to cause, injury to the domestic industry producing the like (*) products, subject to certain requirements. **Even if these measures are not referred to generally as 'exceptions', they allow Members to depart – exceptionally and temporarily - from certain core WTO obligations, for instance, by imposing "tariffs" above the bound levels**.

TIP!

The application of anti-dumping, countervailing and safeguard measures is subject to the requirements set out in the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards respectively. A Member may apply these measures following the conduct of an investigation by a domestic investigating authority pursuant to the procedural requirements set out in the respective Agreements.

(*) In the context of safeguard measures, the Agreement refers to like or directly competitive products.

IV.E: Other exceptions

Balance of Payments (Articles XII and XVIII:B GATT 1994 and XII GATS)

Members may take measures, such as quantitative restrictions, to safeguard their external financial position and to protect their balance of payments (BoPs), subject to specific conditions. While Article XII of the GATT 1994 can be invoked by all Members, Article XVIII:B is available only to developing country Members.

In general, measures taken for BoP purposes are temporary; they may not exceed what is necessary to address the BoP problem at hand; and they must avoid unnecessary damage to the commercial and economic interests of other Members.

Security Exceptions (Articles XXI GATT 1994, XIV bis GATS and 73 TRIPS)

Members may apply trade-restrictive measures if such measures are necessary, for instance, to protect essential security interests, or are taken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security. The categories of measures concerned are broadly defined as: i) measures relating to fissionable materials; ii) measures relating to trade in arms or in other materials related to military use; and iii) measures taken in time of war or other emergency in international relations.

Waivers (Article IX:3 of the WTO Agreement)

Members may request the authorization of other Members to derogate from an obligation contained in the WTO Agreement or in any of the Multilateral Trade Agreements. The decision to "waive" an obligation imposed on a Member is taken by the Ministerial Conference (or General Council). Such a decision shall state the exceptional circumstances of the requesting Member, the terms and conditions governing the application of the waiver and the date of termination. Any waiver granted for a period of more than one year is reviewed annually.

Test your knowledge!

Complete the following statements on exceptions to WTO obligations:

1. Allow Members to meet certain policy objectives considered legitimate subject to specific conditions:

   _ _ _ _ _a _ _ _ _ e _ _ _ _ _ _

2. Permit Members to provide a more favourable treatment on a reciprocal basis to certain chosen Members, subject to certain requirements, and as an exception to the MFN principle:

   _ _ _ _ o _ _ _ _ r _ _ _ _ _ _ _ e _ _ _ _ _

3. Allows Members to protect their essential security interests:

   _ _ _ _ _ _ _ _ e _ _ _ _ _ _ _ _

4. Follow a determination that dumping has occurred and has led to an injury or threat of injury to the domestic industry:

   _ n _ _ _ _ _ _ i _ _ _ u _ _ _ _

5. Allows developed Members to provide more favourable tariff treatment to developing and LDC Members without having to extend such treatment to other WTO Members:

   _n _ _ _ _ _ _ _ l _ _ _ _

Test your knowledge!

Answer:

1. Allow Members to meet certain policy objectives considered legitimate subject to specific conditions:
   GENERAL EXCEPTIONS

2. Permit Members to provide a more favourable treatment on a reciprocal basis to certain chosen Members, subject to certain requirements, and as an exception to the MFN principle:
   REGIONAL TRADE AGREEMENTS

3. Allows Members to protect their essential security interests:
   SECURITY EXCEPTION

4. Follow a determination that dumping has occurred and has led to an injury or threat of injury to the domestic industry:
   ANTIDUMPING DUTIES

5. Allows developed Members to provide more favourable tariff treatment to developing and LDC Members without having to extend such treatment to other WTO Members:
   ENABLING CLAUSE

IV.F: Takeaway messages from Lesson 4

Lesson 4 has discussed the following key points:

- WTO Members may, in certain circumstances, deviate from their main obligations and apply trade restrictive measures, provided that they comply with certain conditions.
- WTO Members have the right to take measures which may restrict trade if, for example, such measures are necessary to protect human, animal or plant life or health, or relate to the conservation of exhaustible natural resources, subject to certain conditions.
- Members are allowed to provide preferential treatment to their trading partners within a customs union or a free trade area (goods), or with regard to economic integration arrangements (services), without having to extend such treatment to all WTO Members, subject to certain conditions.
- The Enabling Clause constitutes an S&D provision, which aims at increasing the commercial opportunities for developing and LDC Members. It allows developed Members to give preferential treatment on a non - reciprocal basis to goods originating in developing and LDC Members, without having to extend such treatment to other Members**.**
- WTO Members are allowed to apply trade defence mechanisms to remedy a situation of unfair trade practices (anti-dumping and countervailing measures) or a surge of imports (safeguard measures).
- Members may take measures, such as quantitative restrictions, to safeguard their external financial position and balance of payments (BOPs), subject to specific conditions.
- Members may apply trade-restrictive measures if they are necessary to protect essential security interests, or in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security.
- In exceptional circumstances, the Ministerial Conference (or General Council) may decide to ‘waive’ an obligation imposed on a Member by the WTO Agreement or any of the Multilateral Trade Agreements.

IV.G: Suggested readings and resources

References for Lesson 4:

Main legal documents:

- Article XX of the GATT (General exception): http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX
- Article XXIV of the GATT (Economic integration exception): http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXIV
- Other Articles of the GATT and WTO Agreements: http://www.wto.org/english/docs_e/legal_e/legal_e.htm#gatt47

Supplementary information:

- Legal Underpinnings: http://www.swisslearn.org/wto/module3/e/start.htm
- Regional Trade Agreements: http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm
- Balance of Payments: http://www.wto.org/english/tratop_e/bop_e/bop_e.htm
- Anti-dumping: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm
- Subsidies and Countervailing Measures: http://www.wto.org/english/tratop_e/scm_e/scm_e.htm

Module 2:

Introduction to the WTO Dispute Settlement System

WTO/OMC
E-LEARNING

Start…

Welcome & Objectives

Welcome to Module 2, which provides an overview of the main functions, objectives and key features of the WTO Dispute Settlement System (DSS). By studying this module and taking the exam, you will be able to, for instance:

Make a presentation about the main characteristics, objectives and functions of the WTO DSS; and

Identify the key rules that provide the legal basis for the WTO DSS.

Structure

This module is divided into **four lessons:**

Lesson 1

Why is the WTO DSS important?

Lesson 2

What are the main stages and characteristics of the WTO DSS?

Lesson 3

Who are the main actors in the WTO DSS?

Lesson 4

What is the scope of WTO disputes?

LESSON 1

Why is the WTO DSS important?

Introduction

Key WTO agreement:
Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

Settling disputes in a timely and structured manner helps to prevent the detrimental effects of unresolved international trade conflicts. It also mitigates the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome. Most people consider the WTO DSS to be one of the major results of the Uruguay Round. After the entry into force of the WTO Agreement in 1995, it soon gained practical importance as Members frequently resorted to using it. Indeed, the DSS plays an important role by enforcing and clarifying the rights and obligations under the WTO Agreement.

The dispute settlement procedure is based on clearly-defined rules, including a timeframe for completing a case. These rules are embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which constitutes Annex 2 of the WTO Agreement.

I.A: Historical development of the DSS

I.A.1: From the GATT to the DSU

As part of the results of the Uruguay Round, the DSU introduced a significantly strengthened DSS. It provides detailed procedures for the various stages of a dispute, including specific time-frames so as to ensure prompt settlement of disputes. As mentioned above, the new DSS is also an integrated framework that applies to all the WTO multilateral agreements, with only minor variations. Some of the most important new features of the system are the appellate review of panel reports, and formal multilateral surveillance of implementation of recommendations and rulings of the Dispute Settlement Body (DSB) following the adoption of the reports.

The current WTO system builds on, and adheres to, the principles for the management of disputes applied under Articles XXII and XXIII of General Agreement on Tariffs and Trade (GATT) 1947 (Article 3.1 of the DSU).

I.A: Historical development of the DSS

I.A.2: “Negative” or “reverse” consensus vs. "positive” consensus

One of the DSU's most important innovations is to eliminate the right of individual parties, typically the party whose measure is being challenged, to block the establishment of a panel or the adoption of a report. That was possible due to the “positive consensus” rule that existed under the GATT 1947. According to this rule, there needed to be a positive consensus among the Members, for example, in order to refer a dispute to a panel. Instead, under the DSU, the decision to accept the panel request or to adopt a panel report is taken unless there is a consensus against it: so-called "negative consensus". This "negative" or "reverse" consensus rule ensures that all procedural stages take place automatically, unless the consensus of Members reverses or otherwise alters this automatic process.

Click here to read a brief case-study on the negative consensus rule.

Key provisions:
Articles 6.1 and 16.4 of the DSU

Suppose that Medatia and Tristat are two WTO Members. Now, suppose that in a dispute between Medatia and Tristat a panel found that Tristat is applying an internal regulation in a manner that discriminates against imported products from Medatia in favour of like domestic products from Tristat. Accordingly, in its final report the panel concludes that Tristat is acting in a manner that is inconsistent with the national treatment obligation provided in Article III:4 of the GATT 1994 (see Module 1). If Tristat does not appeal the report, the next step would be the adoption of the report by the DSB.

According to the negative consensus rule, the DSB will adopt the report unless all WTO Members represented at the meeting of the DSB (including Medatia – the "winning" party) decide against the adoption of the report (Article 16.4 of the DSU). As you may have noticed, in practice, this rule allows the report to be adopted quasi-automatically. After the establishment of a panel, the adoption of a panel report by the DSB is the second key instance in which the decision-making rule of negative consensus applies in the WTO DSS. The quasi-automatic adoption of a panel report pursuant to the negative consensus rule is important because the panel's report only becomes binding after the DSB has adopted it.

It contrasts sharply with the positive consensus rule applied in the old GATT dispute settlement mechanism where, by analogy, a consensus from all WTO Members represented at the meeting of the DSB would be required for the adoption of a ruling. The opposition of only one Member would be enough to block the adoption of a ruling. In our example, under the positive consensus rule, Tristat - the "losing" party - would have been able to block the adoption of the report in the GATT days.

BACK TO COURSE

I.B: What are the objectives and the functions of the DSS?

Provide security and predictability to the MTS

The WTO DSS is a central element in providing security and predictability to the MTS (Article 3.2 of the DSU). Member governments and private economic operators need to have a stable and predictable framework of rules for their commercial activities.

Preserve the rights and obligations of WTO Members

The DSS provides a mechanism through which WTO Members can ensure that their rights under the WTO covered agreements can be enforced. The rulings of the bodies involved are intended to reflect and correctly apply the rights and obligations as they are set out in the WTO Agreement. They must not add to or diminish the rights and obligations provided in the WTO Agreement (Articles 3.2 and 19.2 of the DSU).

Clarify provisions of the WTO Agreement through interpretation

The precise scope of the rights and obligations contained in the WTO Agreement is not always evident from a mere reading of the legal texts. Legal provisions are often drafted in general terms so as to cover a multitude of individual cases. In addition, legal provisions in international agreements often lack clarity because they are compromise formulations resulting from multilateral negotiations. Thus, in most cases, the answer can be found only after interpreting the provision at issue. The DSS is intended to clarify the provisions of the WTO covered agreements in accordance with customary rules of interpretation of public international law (Article 3.2 of the DSU). The customary rules of interpretation will be introduced later on in this Module.

Favour mutually agreed solutions

Although the DSS is intended to uphold the rights of aggrieved Members and to clarify the scope of the rights and obligations, the primary objective of the system is not to make rulings. A solution mutually acceptable to the parties to a dispute, and consistent with the WTO Agreement, is to be preferred. Adjudication is to be used only when the parties cannot work out a mutually agreed solution. Even when the case has progressed to the stage of adjudication, a bilateral settlement always remains possible (Articles 3.7 and 11 of the DSU).

I.C: 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 WTO covered agreements. It puts an end to the former "GATT *à la carte*", where each agreement not only had a different set of signatories but also separate dispute settlement rules. Thus, subject to certain exceptions and special rules (*), the DSU is applicable in a uniform manner to disputes under all the covered agreements. 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).

(*) These include special provisions found in the covered agreements and S&D provisions for developing and LDC Members.

There are several special provisions on "consultation and dispute settlement" in other covered agreements! TO KNOW MORE, click here.

TO KNOW MORE: special provisions on "consultation and dispute settlement" in other covered agreements

Articles XXII and XXIII of the GATT 1994
Article 19 of the Agreement on Agriculture
Article 11 of the SPS Agreement
Article 8.10 of the Agreement on Textiles and Clothing
Article 14 of the TBT Agreement
Article 8 of the TRIMs Agreement
Article 17 of the Anti-Dumping Agreement
Article 19 of the Customs Valuation Agreement
Articles 7 and 8 of the Agreement on Preshipment Inspection
Articles 7 and 8 of the Agreement on Rules of Origin
Article 6 of the Agreement on Import Licensing Procedures
Articles 4 and 30 of the SCM Agreement
Article 14 of the Agreement on Safeguards
Articles XXII and XXIII of the GATS
Article 64 of the TRIPs Agreement

BACK TO COURSE

Test your knowledge!

Match the following statements:

Adjudication is to be used	which applies in a coherent manner to disputes under all the covered agreements.
The DSS provides security and predictability	only where parties cannot reach a mutually agreed solution in conformity with the WTO Agreement.
The DSS is an integrated set of rules	clarify the provisions of the WTO Agreement through interpretation in accordance with public international law.
Since legal provisions are drafted in general terms, it is necessary to	for Member governments and private economic operators to carry out their commercial activities.

Test your knowledge!

Answers:

Adjudication is to be used	which applies in a coherent manner to disputes under all the covered agreements.
The DSS provides security and predictability	only where parties cannot reach a mutually agreed solution in conformity with the WTO Agreement.
The DSS is an integrated set of rules	clarify the provisions of the WTO Agreement through interpretation in accordance with public international law.
Since legal provisions are drafted in general terms, it is necessary to	for Member governments and private economic operators to carry out their commercial activities.

I.D: Takeaway messages from Lesson 1

Lesson 1 has discussed the following key points:

- Settling disputes in a timely and structured manner helps to prevent the detrimental effects of unresolved international trade conflicts and mitigates the imbalances between stronger and weaker players.
- Some of the most important new features of the system are the appellate review of panel reports, and a formal multilateral surveillance of implementation of the rulings and recommendations of the DSB following the adoption of the reports.
- The DSU is a coherent and integrated system of rules and procedures for dispute settlement.
- The objectives and the functions of the DSS are to:
  - Provide security and predictability to the MTS
  - Preserve the rights and obligations of WTO Members
  - Clarify provisions of the WTO Agreement through interpretation
  - Favour mutually agreed solutions
  - Ensure the prompt settlement of disputes
  - Prohibit unilateral determinations and establish an exclusive and compulsory jurisdiction

I.E: Suggested readings and resources

References for Lesson 1:

- The Marrakesh Agreement Establishing the WTO (Article III:3): http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleIII_3
- The Understanding on Rules and Procedures Governing the Settlement of Disputes: http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm
- Understanding the WTO – The WTO dispute settlement system: a unique contribution: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
- More on dispute settlement: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- Video on WTO dispute settlement: http://mdsweb.vuw.ac.nz/Mediasite/Viewer/Viewers/Viewer320TL.aspx?mode=Default&peid=375b3db3-0b6d-4d8e-b3b0-7d45a9d2d904&pid=3daf095e-e1a8-4f1f-8ec2-0abfd39640be&playerType=WM7
- The WTO dispute settlement system training module: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm

Further resources:

- WTO Video - Interview with Professor John Jackson on the WTO's Dispute settlement system: http://www.wto.org/english/res_e/webcas_e/webcas_grid_e.htm?video_type=latest
- WTO Video - 30 years of settling disputes in the multilateral trading system (LAD at 30): http://www.wto.org/english/res_e/webcas_e/webcas_grid_e.htm?video_type=latest

LESSON 2

What are the main stages and characteristics of the WTO DSS?

II.A: Main stages of the WTO DSS

There are three main stages in the WTO dispute settlement process:

1. Consultation phase between the parties;

2. Adjudication by panels and, if applicable, the Appellate Body; and

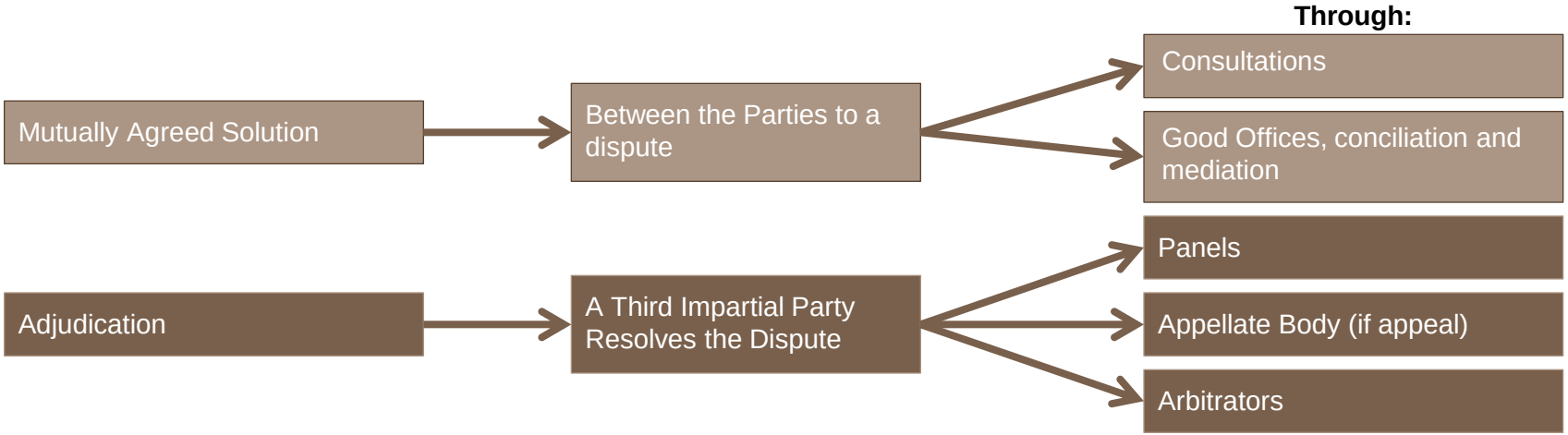
3. The implementation of the rulings, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.

TIP!
Note that good offices, conciliation and mediation are possible at any moment!

II.B: Ways of settling disputes under the DSU

II.B.1: General considerations

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



II.B: Ways of settling disputes under the DSU

II.B.2: Mutually agreed solutions

Key provision:
Article 3.7 of the DSU

The DSU favours solutions mutually acceptable to the parties to the dispute, provided that they are consistent with the WTO Agreements (Article 3.7 of the DSU). Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements must be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto (Article 3.6 of the DSU).

II.B: Ways of settling disputes under the DSU

II.B.3: Consultations

Key provision:
Article 4 of the DSU

The objective of consultations is to allow parties to obtain satisfactory adjustment of the matter before resorting to any further action (Article 4.5 of the DSU). Each Member undertakes to accord sympathetic consideration to, and afford adequate opportunity for, consultation regarding any representation made by another Member concerning measures affecting the operation of any WTO Agreement (Article XXII of the GATT 1994; Article XXII of the General Agreement on Trade in Services (GATS); and Article 4.2 of the DSU). With the exception of arbitration, adjudication cannot be requested until consultations have taken place or unsuccessful attempts to consult have been made.

II.B: Ways of settling disputes under the DSU

II.B.4: Good offices, Conciliation and Mediation

Key provision:
Article 5 of the DSU

Unlike consultations, good offices, conciliation and mediation are not a compulsory stage in the WTO dispute settlement process. Article 5 of the DSU provides for good offices, conciliation and mediation to be undertaken voluntarily if the parties to the dispute agree. They are strictly confidential and do not diminish the position of either party in any subsequent dispute settlement procedure. Good offices, conciliation and mediation may begin at any time and be terminated at any time.

II.B.5: Adjudication

Adjudication under the DSU can be by a panel (Articles 6 to 16 of the DSU), the Appellate Body (Article 17 of the DSU) in case of appeal of the panel report, or an arbitrator (Article 25 of the DSU). Arbitration, as an alternative to dispute resolution, is a possibility that has so far very rarely been used.

II.B: Ways of settling disputes under the DSU

II.B.5: Adjudication

Where consultations do not yield a satisfactory result for the complainant, the procedure starting with the panel stage offers the complainant the possibility to uphold its rights or protect its benefits under the WTO Agreement. This procedure is equally important for the respondent as an opportunity to defend itself because it may disagree with the complainant on either the facts or the correct interpretation of obligations or benefits under the WTO Agreement. The adjudicative stage of dispute settlement is intended to resolve a legal dispute, and both parties must accept any rulings as binding (although they are always able to try to settle the dispute amicably at any time). Panel and Appellate Body reports have, where applicable, to contain the recommendation that a measure which was found inconsistent with a WTO Agreement be brought into conformity with that Agreement (Article 19 of the DSU).

Test your knowledge!

Do you know where the coloured boxes belong? (either under “Alternative to adjudication” or “Adjudication”):

ALTERNATIVE TO ADJUDICATION

ADJUDICATION

Provide an opportunity to obtain satisfactory adjustment before resorting to adjudication

Panel

Appellate Body

Consultations

Good offices, conciliation and mediation

Mutually agreed solution, which can be reached anytime

Rule on whether a measure is inconsistent with the WTO covered agreements

Test your knowledge!

ALTERNATIVE TO ADJUDICATION

Consultations

Provide an opportunity to obtain satisfactory adjustment before resorting to adjudication

Good offices, conciliation and mediation

Mutually agreed solution, which can be reached anytime

ADJUDICATION

Panel

Appellate Body

Rule on whether a measure is inconsistent with the WTO covered agreements

II.C: Takeaway messages from Lesson 2

Lesson 2 has discussed the following key points:

- There are two main ways to settle a dispute once a complaint has been filed in the WTO: (i) the parties may find a mutually agreed solution, particularly during consultations; or, (ii) adjudication.
- Good offices, conciliation and mediation are possible at any moment.
- The DSU favours solutions mutually acceptable to the parties to the dispute, provided that they are consistent with the WTO Agreements.
- Adjudication cannot be requested until consultations have taken place or unsuccessful attempts to consult have been made.
- Adjudication under the DSU can be by a panel, the Appellate Body in case of appeal of the panel report, or an arbitrator. Arbitration, as an alternative to dispute resolution, is a possibility that has so far very rarely been used.

II.D: Suggested readings and resources

References for Lesson 2:

- The Understanding on Rules and Procedures Governing the Settlement of Disputes: http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm
- The WTO dispute settlement system training module: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm

LESSON 3

Who are the main actors in the WTO DSS?

Introduction

The WTO dispute settlement process involves a number of actors. The primary participants are WTO Members themselves, as parties and third parties. Besides, a number of WTO bodies are involved in dispute settlement. Among these, one can distinguish between, on the one hand, a political institution, the DSB; and, on the other hand, independent quasi-judicial bodies, such as panels, the Appellate Body and arbitrators. 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 non-governmental organizations (NGOs) and industry associations are becoming increasingly present in WTO dispute settlement proceedings via *amicus curiae* submissions.

Political	Quasi-judicial	Other
• DSB	• Panels • Appellate Body • Arbitrators	• Independent experts • Specialized institutions • Non-state actors, including NGOs and industry associations

There are certain rules of conduct for the various actors involved in the DSS! TO KNOW MORE, click here!

TO KNOW MORE: Rules of conduct for the actors in the DSS

Under the DSU, the actors taking part in a dispute settlement process are subject to certain rules designed to ensure due process (*) and unbiased decisions. Persons called upon to participate in the DSS as panelists, Appellate Body members or arbitrators must carry out their tasks in an impartial and independent manner (see e.g., Article 8, 11 and 17 of the DSU). Equally, panel and Appellate Body members are prohibited from having *ex parte* communications concerning matters under their consideration (Article 18.1 of the DSU).

In addition, the DSB has adopted Rules of Conduct (WT/DSB/RC/1), which aim at guaranteeing the integrity, impartiality and confidentiality of the DSS. These Rules of Conduct are applicable to panelists, experts and arbitrators, Appellate Body members and staff members of the WTO and Appellate Body Secretariats. Under the Rules of Conduct, these persons are required to be independent and impartial, to avoid direct or indirect conflicts of interest, and to respect the confidentiality of dispute settlement proceedings. 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.

(*) The Appellate Body has found that "due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules". Appellate Body Report, Thailand – Cigarettes (Philippines), para. 147.

BACK TO COURSE

III.A: Parties

Only WTO Member governments have the right to participate in the DSS. The WTO Secretariat, WTO observer countries, other international organizations, and regional or local governments are not entitled to initiate dispute settlement proceedings in the WTO. The DSU sometimes refers to the Member government bringing a dispute as the “complaining party” or the “complainant”. The terms “responding party” or “respondent” are commonly used to refer to the Member government whose measure is challenged by the complainant in the dispute. A dispute may also involve more than one WTO Member as complainant (Article 9 of the DSU). There is no requirement in the DSU for a complainant to have a "legal interest" as a prerequisite for bringing a dispute to the WTO DSS.

III.B: Third parties and third participants

Key provision:
Article 10 of the DSU

A WTO Member that is neither the complainant nor the respondent may be interested in the matter of a dispute. Such Member may participate as a "third party" (also referred to as "third participants" at the appellate stage). Third parties enjoy some rights, such as to have the opportunity to be heard by the panel and to make written submissions, provided that they have a "substantial interest" in the matter before a panel and they have notified such interest to the DSB (Article 10.2 of the DSU). The participation as "third party" offers important advantages, especially to developing country Members, who can gain valuable experience in dispute settlement proceedings without getting directly involved as a party.

III.C: Non-state actors

Since only WTO Member governments can bring disputes, it follows that private individuals or companies do not have direct access to the dispute settlement system, even if they may often be directly and adversely affected by the measures allegedly violating the WTO Agreement. The same applies to non-state actors with a general interest in the matter in dispute.

Should non-state actors be given a more active role in the DSS? TO KNOW MORE about the debate on this issue, click here!

TO KNOW MORE: Non-state actors in the DSS

There are divergent views among Members on whether non-governmental organizations may play a role in WTO dispute settlement proceedings, for example, by filing *amicus curiae* ("friend of the court") submissions. Article 13 of the DSU allows panels to seek information and technical advice from any individuals or bodies which they deem appropriate. According to WTO jurisprudence, Article 13 permits panels and the Appellate Body to accept or reject these submissions (see *US – Shrimp*, Appellate Body Report, paras. 105 - 110; and *EC – Sardines*, Appellate Body Report, paras. 165 & 167).

To date, only a few panels have made use of their discretion to accept and consider unsolicited *amicus curiae* briefs, after consulting with the parties. Since WTO adjudication bodies have no obligation to consider these briefs, *amicus curiae* have no legal right to participate before a panel. However, such briefs may be considered when presented attached to the submission of a party (see e.g. Appellate Body Report, *US - Shrimp*, paras. 89 - 110).

BACK TO COURSE

III.D: WTO bodies

III.D.1: Dispute Settlement Body

The General Council discharges its responsibilities under the DSU through the DSB, which consists of representatives of all WTO Members (Article IV:3 of the Agreement Establishing the WTO). The DSB is responsible for administering the DSU, i.e. for overseeing the entire dispute settlement process. The DSB meets as often as is necessary to carry out its functions within the time-frames provided for in the DSU (Article 2.3 of the DSU). In practice, the DSB usually has one regular meeting per month.

- Main Functions
- Decision-Making

Flow chart of DSB functions

III.D: WTO bodies

III.D.1: Dispute Settlement Body

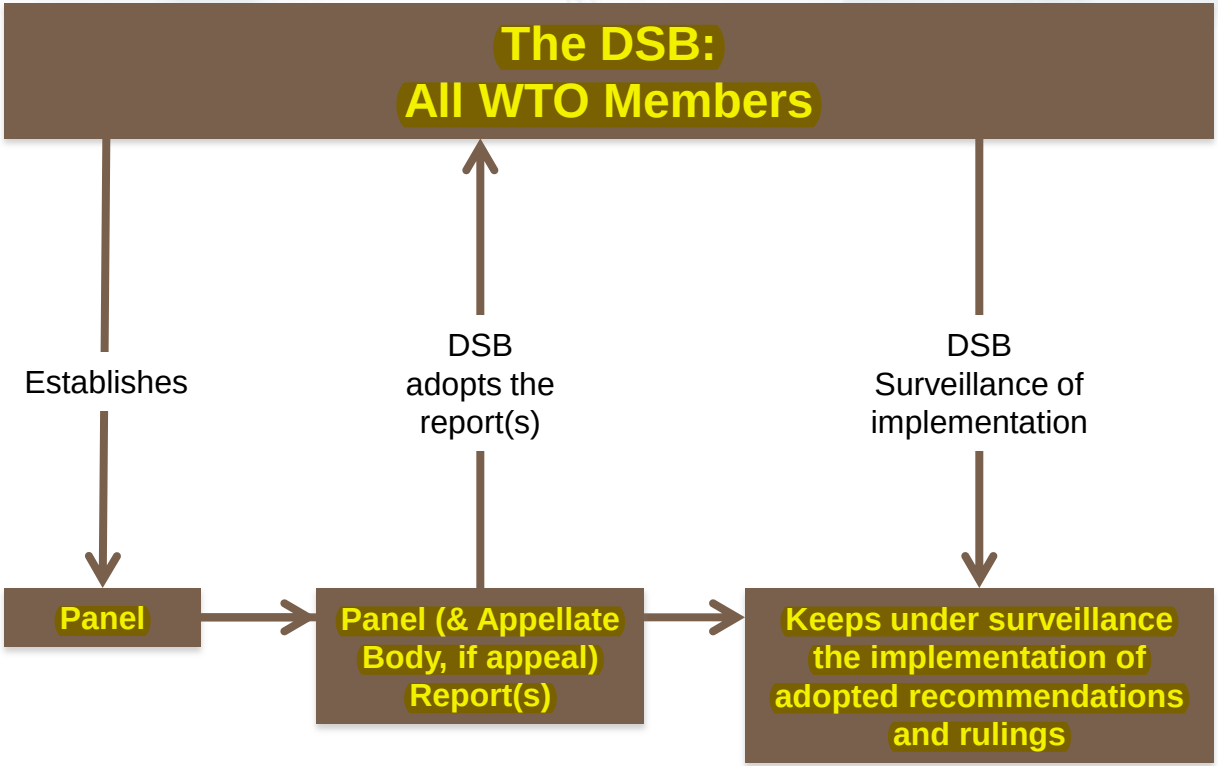
Main Functions

The DSB has the authority to establish panels of experts to consider a case, to adopt panel and Appellate Body reports (which become binding after adoption), maintain surveillance of the implementation of recommendations and rulings of the DSB, and authorize the suspension of obligations under the covered Agreements when a Member does not comply with a ruling (Article 2.1 of the DSU).

Decision-Making

The general rule is for the DSB to take decisions by consensus (Article 2.4 of the DSU). However, a different approach is followed in decision-making at some key stages in the dispute settlement process: establishment of a panel, adoption of panel and Appellate Body reports, and authorization to suspend obligations or retaliate (Articles 6.1, 16.4, 17.14 and 22.6 of the DSU). According to this special decision-making procedure, commonly referred to as "negative" or "reverse" consensus, the DSB must automatically decide to take the action in question, unless there is a consensus not to do so. It contrasts sharply with the "positive consensus" rule applied in the old GATT dispute settlement mechanism, where a consensus was required for the adoption of a ruling.

Flow chart of DSB functions



Test your knowledge!

Match the following statements:

Parties	May have an interest in a dispute but have no right of participation
Third parties	Participate in a dispute as “complainant” or “respondent”
Non-state actors	Oversees the dispute settlement process
Dispute Settlement Body (DSB)	Have an interest in a dispute and enjoy some rights

Test your knowledge!

Parties	May have an interest in a dispute but have no right of participation
Third parties	Participate in a dispute as “complainant” or “respondent”
Non-state actors	Oversees the dispute settlement process
Dispute Settlement Body (DSB)	Have an interest in a dispute and enjoy some rights

III.D: WTO bodies

III.D.2: Panels

Key provisions:
Articles 7, 8 and 11 of the DSU

Where the Members concerned cannot find a mutually agreed solution through consultations, the DSB must, at the request of a party to the dispute, establish a panel. The panel must review the factual and legal aspects of the case and submit a report to the DSB expressing its conclusions on whether the claims of the complainant are well-founded and the measures being challenged are WTO-inconsistent.

III.D: WTO bodies

III.D.2: Panels

There is no permanent panel at the WTO; instead, a different panel is composed for each dispute. Panels consist normally of three (and possibly up to five) experts who examine the legal and factual aspects of the case and submit a report to the DSB. The panel's report includes its conclusions as to whether the challenged measure is consistent or not with the WTO covered agreements (Article 11 of the DSU). Anyone who is well-qualified and independent (Articles 8.1 and 8.2 of the DSU) can serve as panelist. The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn (Article 8.4 of the DSU). It is not necessary to be on the list to be proposed as a potential panel member in a specific dispute. It is interesting to note that individuals from 54 different Members have served as panelists. Of these Members, 23 are developed, 29 are developing and two least-developed. The panel composition stage will be explained in the next Module.

III.D: WTO bodies

III.D.3: The Appellate Body

Key provision:
Article 17 of the DSU

Panel reports can be appealed by either party in a dispute. The Appellate Body is entrusted with the task of reviewing the legal aspects of the reports issued by panels. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel (Article 17.6 of the DSU). In doing so, it also provides consistency of decisions, which is in line with the objective of providing predictability to the system. The Appellate Body phase is the second and final stage in the adjudicatory part of the dispute settlement system.

III.D: WTO bodies

III.D.3: The Appellate Body

The Appellate Body is composed of seven Members who are appointed by consensus by the DSB, to serve for a four-year term, with the possibility of being reappointed once (Article 17.2 of the DSU). Thus, unlike panels, the Appellate Body is a permanent body. It shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the WTO covered agreements generally. The Appellate Body membership must be broadly representative of the WTO membership (Article 17.3 of the DSU).

III.E: Other participants

Arbitrators

Parties may resort to arbitration, as an alternative to dispute resolution through panel and Appellate Body procedures, by mutual agreement (Article 25 of the DSU). So far, this possibility has very rarely been used. Arbitration may also be used during the stage of implementation of -- and alleged non-compliance with -- DSB recommendations.

Experts

Disputes often involve complex factual questions of a technical or scientific nature, for instance when the existence or degree of health risk related to a certain product is the subject of contention between the parties. Because panelists do not necessarily possess expertise in particular specialised fields, the DSU gives panels the right to seek information and technical advice from experts (Article 13 of the DSU).

III.E: Other participants

Certain provisions in the covered agreements explicitly authorize or require panels to seek the opinion of experts. Indeed, panels have appointed individual experts in a considerable number of disputes. Expert review groups generally have an advisory role. The rules for the establishment of expert review groups and their procedures are contained in Appendix 4 to the DSU.

III.F: The WTO Secretariat

The Director-General of the WTO and the Secretariat

The Director-General (DG) may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with a view to assisting Members in settling a dispute (Article 5.6 of the DSU).

The WTO Secretariat assists parties in composing panels by proposing nominations for potential panelists to hear the dispute (Article 8.6 of the DSU), assists panels once they are composed (Article 27.1 of the DSU), and provides administrative support to the DSB. It also assists Members in respect of dispute settlement at their request and provides additional legal advice and assistance to developing Members in matters relating to dispute settlement in a manner ensuring the impartiality of the Secretariat (Article 27.2 of the DSU). In addition, it conducts special training courses (Article 27.3 of the DSU).

III.F: The WTO Secretariat

The Director-General of the WTO and the Secretariat

The DG convenes the meetings of the DSB and appoints panel members upon the request of either party, and in consultation with the Chairpersons of the DSB and the relevant Council or Committee, where the parties cannot agree on the composition (Article 8.7 of the DSU). The DG also appoints the arbitrator(s) during the implementation phase to establish a reasonable period of time for implementation and/or to determine the level of suspension of concessions (footnote to Articles 21.3(c) and 22.6 of the DSU).

The WTO Secretariat also maintains a WTO Dispute Settlement Registry. The Secretariat and Members are currently developing "Digital Dispute Settlement Registry" that would maintain all files and other relevant information from a dispute in a secure, encrypted database and could allow parties to file their submissions and other documents electronically directly through a secured, password-protected web-based portal.

Test your knowledge!

Match the following statements:

Panels	Legal assistance to adjudicating bodies and administrative assistance to DSB
Appellate Body	Provide advice on complex factual issues in disputes
Experts	Permanent body that reviews only legal aspects of the dispute
WTO Secretariat	Must review the factual and legal aspects of the dispute

Test your knowledge!

Answer:

Panels	Legal assistance to adjudicating bodies and administrative assistance to DSB
Appellate Body	Provide advice on complex factual issues in disputes
Experts	Permanent body that reviews only legal aspects of the dispute
WTO Secretariat	Must review the factual and legal aspects of the dispute

III.G: Takeaway messages from Lesson 3

Lesson 3 has discussed the following key points:

- The primary participants 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, on the one hand, a political institution, the DSB, and, on the other, independent quasi-judicial bodies, such as panels, the Appellate Body and arbitrators. 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 non-governmental organizations (NGOs) and industry associations are becoming increasingly present in WTO dispute settlement proceedings.
- Only WTO Member governments have the right to participate in the DSS.
- A WTO Member that is neither the complainant nor the respondent may be interested in the matter of a dispute. Such Member may participate as a "third party".
- The panel must review the factual and legal aspects of the case and submit a report to the DSB expressing its conclusions on whether the claims of the complainant are well-founded and the measures being challenged are WTO-inconsistent.
- The Appellate Body is entrusted with the task of reviewing the legal aspects of the reports issued by panels. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.
- The DSU gives panels the right to seek information and technical advice from experts.

III.H: Suggested readings and resources

References for Lesson 3:

- The Marrakesh Agreement Establishing the WTO (Article III:3): http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleIII_3
- The Understanding on Rules and Procedures Governing the Settlement of Disputes: http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm
- The Appellate Body: http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm
- More on dispute settlement: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- The WTO dispute settlement system training module: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm

LESSON 4

What is the scope of WTO disputes?

IV.A: When can a dispute be initiated?

There is no requirement in the DSU for a complainant to have a legal or economic interest as a prerequisite for bringing a dispute to the WTO DSS. Article 3.7 of the DSU entrusts the Members with the responsibility of exercising their own judgement in deciding whether it would be fruitful to bring a case under the DSU. This provision "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" (*).

(*) Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73.

IV.B: What claims can be raised?

The DSU applies to all disputes brought under the “covered agreements”, that is, those WTO Agreements listed in Appendix 1 of the DSU (Article 1.1 of the DSU). This means that **Members cannot bring to the WTO DSS disputes concerning the rights and obligations encompassed in legal provisions outside the “covered agreements”**. The covered agreements also include the so-called Plurilateral Trade Agreements contained in Annex 4 to the Agreement Establishing the WTO (Appendix 1 of the DSU). The applicability of the DSU to the Plurilateral Agreements is subject to the adoption of a decision by the parties to each of these Agreements setting out the terms for the application of the DSU to the individual agreement, including any special and additional rules or procedures (Appendix 1 of the DSU).

IV.B: What claims can be raised?

Marrakesh Agreement Establishing the WTO (WTO Agreement)

Annex 1

1A: MTAs on Goods (GATT +12)
1B: GATS
1C: TRIPS

Annex 2

Dispute Settlement Understanding (DSU)

Annex 3

Trade Policy Review Mechanism (TPRM)

Annex 4

Plurilateral Agreements (subject to decision by parties)

IV.C: What are the different types of complaints?

Key provision:
Article XXIII of the GATT

Articles XXII and XXIII of the GATT 1994 provide the legal basis for WTO disputes. According to Article XXIII, a Member can resort to the DSS if it considers that any benefit accruing to it directly or indirectly under the Agreement is being "nullified or impaired", or that the attainment of any objective of the Agreement is being impeded on the basis of one of the three types of complaint specified below:

Type of complaint	Example	Comment
Violation complaint	The respondent fails to carry out its obligations. This is by far the most common type of complaint in the WTO.	Nullification or impairment is presumed to exist (Article 3.8 of the DSU)
Non-violation complaint	A WTO-consistent measure frustrates the benefit a Member legitimately expects from another Member (for an example see Japan- Film, DS44). Only a few cases have been brought on the basis of a non-violation complaint.	The complainant must prove the existence of nullification or impairment. Non-violation complaints are not currently foreseen for disputes concerning the TRIPs Agreement. The Appellate Body has stated that non-violation complaints "should be approached with caution and should remain an exceptional remedy" (Appellate Body Report, EC- Asbestos, para. 186.).
Situation complaint	Covers any situation other than those mentioned above. No situation complaint has ever been raised at the WTO.	The complainant must prove the existence of nullification or impairment. Situation complaints are not foreseen for disputes concerning the GATS and the TRIPs Agreement.

IV.D: What can be challenged?

Disputes are most commonly initiated because a Member's measure leads to an alleged violation of one or more specific provisions of the covered agreements. The DSU does not define the notion of "measure". As explained by the Appellate Body, a measure is any act or omission attributable to a WTO Member which has normative value, irrespective of how or whether those rules or norms are applied in a particular instance (*). The measure susceptible of challenge:

- Must be attributable to a WTO Member (covers all regional levels or other subdivisions of governments, except as otherwise provided in a covered agreement).
- May cover not only actions, but also failures to act. For example, the TRIPS Agreement obliges Members to provide for the protection of new or original independently created industrial designs (Article 25.1). This is a typical obligation to take positive action by passing and applying a law granting such protection. Any omission or failure to act could constitute a failure to comply with the TRIPS Agreement.
- Can take the form of laws, regulations, administrative instructions, etc. and their implementing instruments.
- May be binding or non-binding - the WTO system is intended to protect not only existing trade but also the security and predictability needed to conduct future trade.
- Must, as a general rule, be in existence at the time of the establishment of the panel (includes measures that have already been adopted, but not yet entered into force).

(*) Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

IV.E: Rules of interpretation

The precise scope of the rights and obligations contained in the WTO agreements is not always evident from a mere reading of the legal texts. Article 3.2 of the DSU recognizes the need to clarify the rights and obligations of Members under the WTO covered agreements pursuant to "customary rules of interpretation of public international law". While customary international law is normally unwritten, the Vienna Convention on the Law of Treaties (VCLT) has codified in Articles 31, 32 and 33 the customary rules of treaty interpretation. Although Article 3.2 of the DSU does not refer expressly to the VCLT, the Appellate Body has recognized that the provisions mentioned above have the status of customary or general international law (*).

(*) Appellate Body Report, *US – Gasoline*, p. 17; and, Appellate Body Report, *Japan – Alcoholic Beverages* II, p. 10

TIP!

WTO adjudicating bodies make frequent reference to these rules contained in the VCLT when interpreting provisions contained in the covered agreements. These legal interpretations are binding only on the parties to a dispute.

TO KNOW MORE about the rules of treaty interpretation used in WTO law, click here!

TO KNOW MORE: The Rules of Interpretation (VCLT)

In accordance with rules of interpretation contained in the VCLT, the WTO Agreement is to be interpreted according to the ordinary meaning of the words in the relevant provision, viewed in their context and in the light of the object and purpose of the agreement (Article 31 of the VCLT). The "context" includes the text of the treaty, including its preamble and annexes, as well as certain agreements and instruments relating to the conclusion of the treaty under certain circumstances.

The VCLT also permits the interpreter to have recourse to subsequent agreements or practice between the parties regarding the interpretation of the treaty or the application of its provisions.

If the interpretative result needs to be confirmed or is ambiguous, obscure, manifestly absurd or unreasonable, recourse may be had to supplementary means of interpretation, such as the negotiating history of the agreement (Article 32 of the VCLT). The WTO Agreement is authentic in English, French and Spanish, so the provisions of Article 33 of the VCLT concerning treaties in multiple languages are relevant in its interpretation.

The text of the VCLT can be found at:
http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

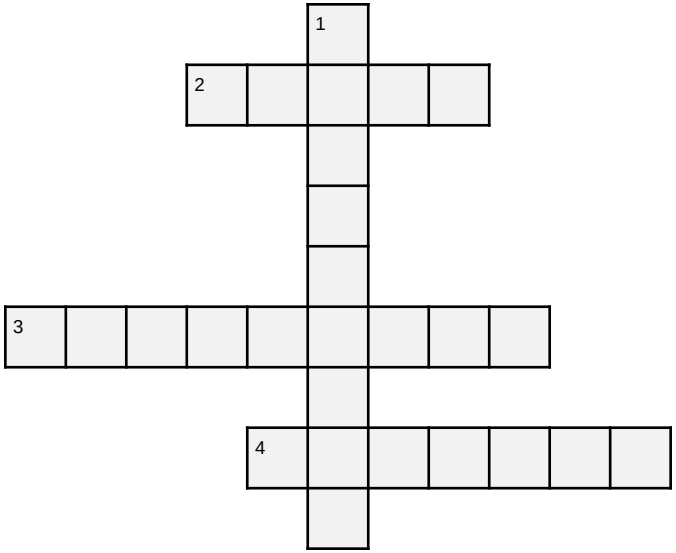
BACK TO COURSE

Test your knowledge!

Can you find the words?

Definitions

1. Type of complaint that is based on the failure to abide by a WTO obligation, through an act or an omission.
2. Non-violation complaints cannot be raised under this agreement.
3. Type of complaint that has never been raised in the WTO.
4. Type of agreements under the WTO's jurisdiction.

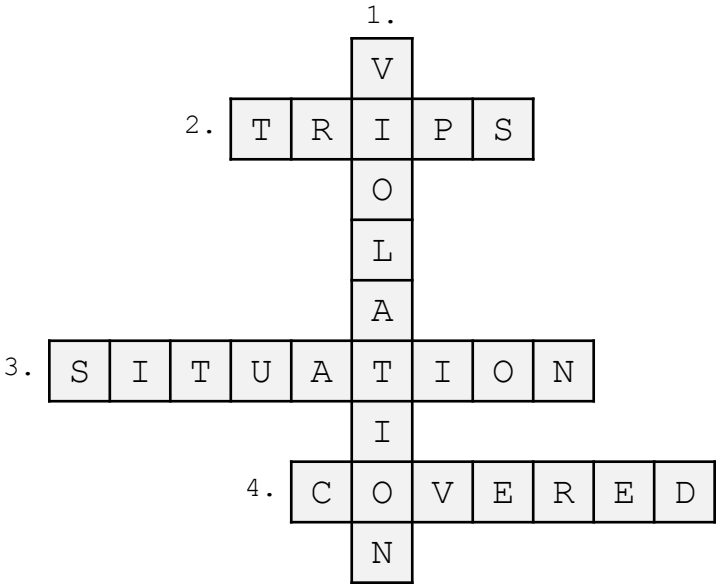


Test your knowledge!

Answer:

Definitions

1. Type of complaint that is based on the failure to abide by a WTO obligation, through an act or an omission.
2. Non-violation complaints cannot be raised under this agreement.
3. Type of complaint that has never been raised in the WTO.
4. Type of agreements under the WTO's jurisdiction.



IV.F: Takeaway messages from Lesson 4

Lesson 4 has discussed the following key points:

- There is no requirement in the DSU for a complainant to have a legal or economic interest as a prerequisite for bringing a dispute to the WTO DSS.
- Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU.
- Members cannot bring to the WTO DSS disputes concerning the rights and obligations encompassed in legal provisions outside the “covered agreements”.
- A Member can resort to the DSS if it considers that any benefit accruing to it directly or indirectly under the Agreement is being “nullified or impaired”, or that the attainment of any objective of the Agreement is being impeded on the basis of one of “violation”, “non-violation” or “situation” complaints.
- A measure is any act or omission attributable to a WTO Member which has normative value, irrespective of how or whether those rules or norms are applied in a particular instance.
- Article 3.2 of the DSU recognizes the need to clarify the rights and obligations of Members under the WTO covered agreements pursuant to "customary rules of interpretation of public international law”.

IV.G: Suggested readings and resources

References for Lesson 4:

- Understanding the WTO – The WTO dispute settlement system: a unique contribution: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
- More on dispute settlement: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- The disputes: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes
- Map of disputes between WTO Members: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm

Module 3:

The WTO Dispute Settlement Process

WTO/OMC
E-LEARNING

Start…

Welcome & Objectives

Welcome to Module 3 on the WTO Dispute Settlement process. This module focuses on some of the main stages in a WTO dispute, namely consultations between the parties, and adjudication by panels and, if applicable, by the Appellate Body. By studying this module and taking the exam, you should be able to:

Understand the fundamental features of the panel and appellate review processes;

Find key documents related to **panel or Appellate Body proceedings**; and

Advise your administration in relation to the procedures governing the settlement of a dispute in the WTO.

Structure

This module is divided into **three lessons**:

Lesson 1

How and why do WTO Members enter into consultations?

Lesson 2

What are the main rules and procedures governing the panel review process?

Lesson 3

What are the main rules and procedures governing the appellate review process?

LESSON 1

How and why do WTO Members enter into consultations?

I.A: The preferred outcome of a dispute

I.A.1: Core principles

Key provisions:
Articles 3.7 and 4.7 of the DSU

In the WTO, the preferred outcome of a dispute is for the Members concerned to find a mutually acceptable solution that is consistent with the WTO Agreements (Article 3.7 of the Dispute Settlement Understanding – "DSU"). Accordingly, **consultations between the parties constitute the first stage in a WTO dispute.** They are also a prerequisite for panel proceedings. Therefore, a complainant may request adjudication by a panel only if the consultations with the respondent have failed to settle the dispute (Article 4.7 of the DSU).

First stage → Consultations, Art. 4 of the DSU

I.A: The preferred outcome of a dispute

I.A.2: Technical note on notifications

Key document:
WT/DSB/6

The Dispute Settlement Understanding (DSU) and some of the covered agreements foresee a number of instances where parties are required to notify documents to the Dispute Settlement Body (DSB) and the relevant Councils and Committees. For instance, any request for consultations should be notified to the DSB and the relevant Councils and Committees in accordance with Article 4.4 of the DSU. The notifying Member should send the document to the Secretariat (Council Division) specifying the relevant Councils or Committees to which it wishes the notification to be addressed. The Secretariat will then distribute the document to the relevant WTO bodies.

The documents notified to the DSB and the relevant Councils and Committees will be issued as official documents under the WT/DS series and will be made available to the public in the three official languages of the WTO (English, French and Spanish).

Each dispute is assigned a specific “DS” number. **The first official document to be issued in connection with a dispute is the request for consultations** which will carry the document symbol WT/DS###/1.

I.B: The purpose of consultations

Key provisions:
Articles 3.7 and 4.5 of the DSU

Consultations provide the parties with an opportunity to discuss the matter(s) at issue and to find a solution to the dispute before resorting to adjudication under the DSU. **Through consultations, parties exchange information, assess the weaknesses of their respective cases, narrow the scope of their differences and, in many cases, find a mutually acceptable solution to the dispute**. Where no mutually acceptable solution is found, consultations provide the parties with an opportunity to define and delimit the scope of the dispute.

NOTE

The majority of WTO disputes have not proceeded beyond the consultations stage, either because a satisfactory settlement was found, or because the complainant decided not to pursue the matter further. This shows that consultations are often an effective means of resolving disputes in the WTO and that recourse to adjudication is not always necessary. Indeed, more than half of the disputes lodged at the WTO do not generally proceed to the panel stage.

I.C: Legal basis and requirements for a request for consultations

The request for consultations formally initiates a dispute. The 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 of the covered agreement(s) at issue. Consultations are thus subject to the provisions of Article 4 of the DSU and the relevant covered agreement(s).

Under the GATT 1994 and those covered agreements that refer to the consultations and dispute settlement provisions of the GATT 1994, **two legal bases** are available for launching a dispute, namely under Article XXII:1 and Article XXIII:1 of the GATT 1994. The main distinction between these two legal bases is the ability of other WTO Members to join as third parties in the consultations. This is possible only when Article XXII:1 is invoked. Under the GATS, consultations can be initiated under either Article XXII:1 or XXIII:1.

I.C: Legal basis and requirements for a request for consultations

The complaining Member addresses the request for consultations to the responding Member, but must also notify the request to the DSB and to the relevant councils and committees overseeing the agreement(s) in question (Article 4.4 of the DSU). The request must be made in writing. It shall give the reasons for the request, including the identification of the measures at issue and an indication of the legal basis of the complaint (Article 4.4 of the DSU).

I.D: Procedures and timeframes

I.D.1: Confidentiality and the role of the Secretariat

Key provision:
Article 4.6 of the DSU

Consultations between the parties to a dispute are confidential (Article 4.6 of the DSU). The WTO Secretariat is not involved in this phase of the dispute. The content of the consultations remains undisclosed to any panel subsequently assigned to examine the matter. Indeed, panels cannot use as a basis for their determination anything the parties may allege took place during consultations (*).

(*) Appellate Body Report, US - Upland Cotton, para. 287.

TIP!
Mutually agreed solutions reached during this stage must be notified to the DSB and the relevant councils and committees, where any Member may raise any point relating thereto (Article 3.6 of the DSU).

I.D: Procedures and timeframes

I.D.2: Options for respondents and complainants

Unless otherwise agreed by the parties, **the respondent must reply to the request 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.

Deadline missed!

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 (Article 4.3 of the DSU).

Deadline met!

If the respondent engages in consultations, but such consultations fail to settle the dispute within 60 days after the date of receipt of the request for consultations, the complainant may request the establishment of a panel (Article 4.7 of the DSU).

Consultations can also be concluded earlier if both parties consider that they have failed to settle the dispute (Art. 4.7 of the DSU). However, **the parties often allow themselves significantly more time for consultations than the minimum of 60 days.**

Even when initial consultations have failed to resolve the dispute, the parties may still find a mutually agreed solution at a later stage in the proceedings.

I.D: Procedures and timeframes

I.D.3: Cases of urgency

Key provision:
Article 4.8 of the DSU

In cases of urgency, including those that concern perishable goods, Members must enter into consultations within a period of no more than 10 days after the date of receipt of the request. In such cases, the complaining party may request the establishment of a panel if the consultations fail to settle the dispute within a period of 20 days after the date of receipt of the request (Article 4.8 of the DSU).

I.E: Third parties in consultations

I.E.1: The inclusion of third parties

Key provision:
Article XXII:1 of the GATT 1994, Article XXII:1 of the GATS, and Article 4.11 of the DSU

WTO Members can join as third parties in the consultations only when consultations are requested pursuant to Article XXII:1 of the GATT 1994, Article XXII:1 of the GATS, or any of the corresponding consultation provisions in other covered agreements (Article 4.11 of the DSU)(*). Consultations requested under Article XXIII:1 of the GATT 1994 are not open to third parties. Hence, **the choice to request consultations on the basis of Articles XXII:1 or XXIII:1 of the GATT 1994 is a strategic one, and depends on whether the complainant wants to make it possible for other Members to participate**. Even if the complainant invokes Article XXII:1, making the participation of third parties possible, the admission of an interested third party in the consultations process will ultimately depend on the respondent, who may or may not accept such a request.

(*) The Member wishing to join the consultations as a third party may notify the consulting Members and the DSB within ten days after the date of circulation of the original request for consultations. In practice, requests to join consultations are addressed to the respondent with a copy to the complaining party and the chairperson of the DSB. The acceptance of the request depends on the respondent, provided the complaining party has not already excluded the participation of third parties by invoking Article XXIII:1 of the GATT 1994 in its request for consultations. The option of requesting consultations under Article XXIII:1 of the GATT 1994 may be attractive for a complainant wishing to work towards a mutually agreed solution with the respondent without the presence of other Members.

I.E: Third parties in consultations

I.E.2: The “substantial trade interest”

Key provision:
Article XXII:1 of the GATT 1994, Article XXII:1 of the GATS, and Article 4.11 of the DSU

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 GATT 1994, Article XXII:1 of GATS or the corresponding provisions of the other covered agreements (Article 4.11 of the DSU). **The respondent must also agree that the requesting Member has a “substantial trade interest” in the consultations**.

TIP!
What is a "substantial trade interest”?
The term “substantial trade interest” is not defined under the DSU. If the respondent considers that the requesting Member does not have such an interest in the dispute, there is no recourse through which the requesting Member can impose its presence at the consultations. The requesting Member, however, can always request consultations directly with the respondent.

Why participate as a third party in consultations?

I.E: Third parties in consultations

I.E.3: Why participate as a third party in consultations?

Why participate as a third party 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. There are various reasons for such an interest: the Member may have a trade interest and feel similarly aggrieved by the challenged measure or it may, on the contrary, benefit from that measure; it may be concerned about the challenge because it maintains a measure similar to that of the respondent; or it may simply have a systemic interest in the dispute. The Member in question may also have an interest in being present at any discussion on a mutually agreeable solution because such a solution may affect its interests."

Test your knowledge!

True or False?

TRUE

Third parties requesting to join consultations may only be allowed to participate if the complaining Member agrees that they have a substantial trade interest in the consultations.

The request for consultations must be submitted in writing. It shall give the reasons for the request, including the identification of the measures at issue and an indication of the legal basis of the complaint.

The complaining Member shall address the request for consultations to the responding Member only.

In practice, consultations often last longer than the minimum period of 60 days.

FALSE

Consultations between the parties constitute the first stage of a WTO dispute.

If consultations are requested pursuant to Article XXIII:1 of the GATT 1994, other Members can join the consultations as third parties.

Consultations are non-mandatory. Therefore, the complainant may request the establishment of a panel without having first attempted to resolve the dispute through consultations.

The majority of WTO disputes have been resolved at the stage of consultations, i.e. without reaching the stage of adjudication.

Test your knowledge!

Answer:

TRUE

Consultations between the parties constitute the first stage of a WTO dispute.

The majority of WTO disputes have been resolved at the stage of consultations, i.e. without reaching the stage of adjudication.

The request for consultations must be submitted in writing. It shall give the reasons for the request, including the identification of the measures at issue and an indication of the legal basis of the complaint.

In practice, consultations often last longer than the minimum period of 60 days.

FALSE

Consultations are non-mandatory. Therefore, the complainant may request the establishment of a panel without having first attempted to resolve the dispute through consultations.

If consultations are requested pursuant to Article XXIII:1 of the GATT 1994, other Members can join the consultations as third parties.

The complaining Member shall address the request for consultations to the responding Member only.

Third parties requesting to join consultations may only be allowed to participate if the complaining Member agrees that they have a substantial trade interest in the consultations.

I.F: Takeaway from Lesson 1

Lesson 1 discussed the following key points:

- In WTO Dispute Settlement, the preferred outcome is for the parties to the dispute to find a solution that is mutually acceptable to them and consistent with the WTO Agreements, i.e. without resorting to adjudication.
- Consultations between the parties are the first stage of a WTO dispute. Through consultations, parties exchange information, assess the weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution.
- A third party may consider that it has a substantial trade interest and seek to join in consultations because it feels aggrieved by the challenged measure or, on the contrary, because it benefits from the measure; it may be concerned about the challenge because it maintains a measure similar to that of the respondent; or it may simply have a systemic interest in the dispute.
- The parties often allow themselves more time for consultations than the minimum period of 60 days.
- 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 in the proceedings.

I.G: Suggested readings and resources

References for Lesson 1:

- Understanding the WTO – The WTO dispute settlement system: a unique contribution: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
- More on dispute settlement: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- The WTO dispute settlement system training module: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm

LESSON 2

What are the main rules and procedures governing the panel review process?

Introduction

If consultations fail to resolve the matter at issue, the complaining party may request the establishment of a panel to adjudicate the dispute. Both the complainant and the respondent have a strong stake in this procedure:

- **The complainant** has the possibility to uphold its rights or to protect its benefits under the WTO Agreement.
- **The respondent** has an opportunity to defend itself as it may disagree with the complainant on either the facts or the correct interpretation of obligations or benefits under the WTO Agreement.

The adjudication stage is intended to resolve the dispute (although parties may decide to settle the dispute amicably at any time).

Adjudication → Panel Stage Art. 6 - 16 of the DSU

II.A: The panel request

II.A.1: General considerations

Key provision:
Article 6.2 of the DSU

The panel request initiates the phase of adjudication. A panel request must be made in writing and must be addressed to the chairperson of the DSB with a copy to the respondent. The WTO Secretariat will issue the request as an official document under the WT/DS series and will circulate it to the entire WTO membership. **According to Article 6.2 of the DSU, the panel request must indicate whether consultations were held. In addition, the panel request must**:

1. Identify the specific measure(s) at issue; and

2. Provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly (i.e. the claims).

II.A: The panel request

II.A.1: General considerations

1. Identify the specific measure(s) at issue; and

Measures can be identified by their form (i.e. by the name, number, date and place of promulgation of a law, regulation, etc.)(*) and by their substance (i.e. by providing a narrative description of the nature of the measure so that what is referred to adjudication by a panel may be discerned from the panel request). (*) Appellate Body Report, US-Continued Zeroing, para. 168

2. Provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly (i.e. the claims).

The identification of the treaty provision(s) claimed to have been violated by the respondent is a minimum prerequisite. However, the mere listing of provisions from the covered agreements will not necessarily be sufficient in all cases; rather, this will depend on the circumstances of each case. A brief summary of the legal basis should explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question (**). (**) Appellate Body Report, EC-Selected Customs Matters, para. 130

II.A: The panel request

II.A.2: Crucial importance of the panel request

Key provision:
Article 7.1 of the DSU

The panel request serves the due process objective of notifying the respondent and the third parties of the nature of the complainant's case. **If the claims or measures are not identified in the panel request with sufficient clarity, the respondent may request the panel to rule that such claims or measures fall outside of the panel's jurisdiction. In certain cases, the panel has declined to exercise its jurisdiction (and therefore to make findings) in respect of certain measures and/or claims on the basis that the panel request did not meet the requirements of Article 6.2 of the DSU.**

What happens if more than one WTO Member requests the establishment of a panel related to the same matter? TO KNOW MORE about disputes involving "multiple complainants", click here.

II.A: The panel request

II.A.2: Crucial importance of the panel request

As explained later on, the panel request determines the terms of reference of the panel. In other words, the panel request defines and limits the scope of the dispute and thereby the extent of the panel's jurisdiction. The object of the panel's review is limited to the measure(s) and claims identified in the panel request.

TO KNOW MORE: Multiple complainants

Given that governmental measures regulating trade often affect several WTO Members, there is frequently more than one Member taking issue with a measure that is allegedly breaching WTO law or impairing benefits under the WTO agreements.

A WTO Member affected by another Member's measure is faced with several options. The aggrieved Member may choose to play a 'passive' role by letting another Member initiate dispute settlement proceedings. In that case, if the dispute results in the withdrawal of the measure at issue, such withdrawal will also indirectly benefit the 'passive' Member. Another option would be to participate in the dispute settlement proceedings as a third party. As will be explained later on, a Member participating in a dispute as a third party will have the advantage of receiving information on the dispute, and of being heard by the panel and the parties to the dispute (Article 10.2 and 10.3 of the DSU). A third party can always decide to initiate a dispute settlement proceeding in its own right if it considers that a matter that is already before a panel nullifies or impairs the benefits accruing to it under the covered agreements (Article 10.4 of the DSU). Finally, the most active strategy that a Member may pursue is to take part in a dispute as a complainant by requesting consultations and then the establishment of a panel, either in parallel or jointly with other (co-) complainants.

Article 9 of the DSU contemplates the situation where more than one Member requests the establishment of a panel related to the same matter. In such situations, two scenarios are envisaged:

Whenever feasible, a single panel may be established to examine the multiple complaints (Article 9.1 of the DSU); and

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).

BACK TO COURSE

II.B: The panel's standard of review

Key provision:
Article 11 of the DSU

Article 11 of the DSU articulates the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements. The panel examines the validity of the complainant's claim that the respondent has acted inconsistently with its WTO obligations or in such a way that the complainant's benefits under the agreements were nullified or impaired. In so doing, the panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence. In addition to making an **objective assessment of the facts of the case**, Article 11 also directs the panel to **make an objective assessment of the applicability of and conformity of the measure with the relevant covered agreements**.

Article 11 of the DSU also directs 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". 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.

One covered agreement, the Anti-Dumping Agreement, sets out a special standard of review for panels in Article 17.6. This special provision is intended to provide a greater margin of deference to the Member's anti-dumping determination than would be available under Article 11 of the DSU.

II.C: Establishment of a panel by the DSB

Key provision:
Article 6.1 of the DSU

Establishing panels is one of the functions of the DSB. The decision to establish a panel is one of the few decisions by the DSB that do not require a consensus among Members. At the first DSB meeting where such a request is made, the responding Member can oppose the panel's establishment, as was the case under the GATT 1947. However, at the second DSB meeting where the request is placed on the agenda, the panel will be established unless the DSB decides by consensus ***not*** to establish the panel, i.e. by reaching a "negative" or "reverse" consensus (Article 6.1 of the DSU).

In practical terms, **the reverse consensus rule means that ultimately a panel will be established if the complaining party so requests**. Therefore, the DSB decision to establish a panel is often described as being virtually automatic.

TIP!
The second DSB meeting usually takes place about a month after the first meeting where the request for establishment of a panel was made but the complaining party can also request a special meeting of the DSB within 15 days of the request, provided that at least ten days' advance notice of the meeting is given (footnote 5 to Article 6.1 of the DSU).

II.D: Third parties

II.D.1: Introduction

Key provision:
Article 10.2 of the DSU

The complaining and responding Members are the parties to the disputes. **Other Members have an opportunity to be heard by panels and to make written submissions as third parties, even if they have not participated in the consultations**. Members wishing to join the proceedings as third parties must satisfy the following requirements:

- They must have a “substantial interest” in the matter before the panel; and
- They must notify to the DSB their request to participate in the dispute as a third party.

II.D: Third parties

II.D.2: Substantial interest

To participate as a third party in a dispute, Members must have a “substantial interest” in the matter before the panel (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 be accepted by the respondent.

In practice, because a "substantial interest” could be of a systemic nature, any Member invoking such an interest could become a third party to panel proceedings, without the respondent being able to oppose it.

II.D: Third parties

II.D.3: Timing of the request

Key documents:
C/COM/3, 27 June 1994 and C/M/273, 12 July 1994

The DSU does not provide a deadline for third parties to request to join panel proceedings. Third parties are merely required to notify the DSB of their substantial interest in the matter (Article 10.2 of the DSU). In the absence of a deadline, a late request by a Member to become a third party could delay the "prompt settlement" of the dispute. To prevent such an outcome, the GATT Council agreed on a Chairman's Statement inviting Members to notify their third party interest to the DSB on the day a panel is established, or, if that is not possible, to notify their interest in writing within ten days from the establishment of the panel.

Therefore, after declaring the establishment of a panel, the Chairperson of the DSB normally invites Members interested in participating as third parties in the dispute to reserve their rights at that meeting, or to do so in writing within ten days from the establishment of the panel. In practice, Members generally comply with this deadline.

II.D: Third parties

II.D.4: Third party rights and "enhanced" third party rights

Key provisions:
Articles 10.2 and Appendix 3, para. 6 of the DSU

Under the DSU, a WTO Member participating in a dispute as a third party is afforded standard rights defined under Articles 10.2 and 10.3 and Appendix 3, paragraph 6 of the DSU. Upon request from one or more of the third parties, and in consultation with the parties to the dispute, panels have on occasion exercised their discretion to grant additional or "enhanced" rights to third parties (*)**.**
In deciding whether or not to grant enhanced third party rights, panels have considered various factors, such as the significant economic effect of the measure at issue on certain third parties; the importance of trade in the product at issue to certain third parties; and the significant trade policy impact that the outcome of the case could have on third parties maintaining measures similar to the measure at issue. Procedural issues, such as potential delays in the proceedings or confidentiality of closed sessions, have also been considered by previous panels as relevant factors against the granting of enhanced third party rights.

Click here to see lists of "standard" and "enhanced" third party rights.

(*) Appellate Body Reports, US – FSC (Article 21.5 – EC), para. 243; EC-Hormones, para. 154; US- 1916, para. 150.

Third party rights pursuant to the DSU	Enhanced third party rights
The DSU explicitly grants the following rights to third parties in panel proceedings: (i) the right to be heard by the panel (Article 10.2 of the DSU and Appendix 3, paragraph 6); (ii) the right to make written submissions to the panel (Article 10.2 of the DSU); and (iii) the right to receive the submissions of the parties to the dispute to the first meeting of the panel (Article 10.3 of the DSU). This wording has been interpreted as allowing third parties to receive not only the parties' first written submissions but also any other submission received by the panel before the first substantive meeting of the panel (**). (**) Appellate Body Report, US – FSC (Article 21.5 – EC), para. 245.	The types of enhanced third party rights most commonly granted by panels include: (i) the right to attend the entirety of the first and second substantive meetings as observer; (ii) the right to receive a copy of the panel's questions to the parties and other third parties posed in the context of the first substantive meeting; (iii) the right to receive the written rebuttals (i.e. second written submissions) of the parties before the second meeting of the panel and the parties' replies to the panel questions; and (iv) the right to make a brief statement in a special session set aside for third parties in the context of the second substantive meeting.

BACK TO COURSE

Test your knowledge!

Please complete the following statements:

1. Besides indicating whether consultations were held, the panel request must _____ and provide a brief, but sufficiently clear, summary of the legal basis of the complaint.

2.The panel request defines and limits the scope of the dispute and thereby the extent of the panel's _____.

3. A panel will be established at the request of the complaining party unless the DSB decides *against* it by consensus. This decision-making procedure is commonly referred to as _____.

4.The types of enhanced third party rights more commonly granted by panels include: _____, _____, _____.

Test your knowledge!

Answer:

1. Besides indicating whether consultations were held, the panel request must **identify the specific measure(s) at issue** and provide a brief, but sufficiently clear, summary of the legal basis of the complaint.

2.The panel request defines and limits the scope of the dispute and thereby the extent of the panel's **jurisdiction**.

3. A panel will be established at the request of the complaining party unless the DSB decides *against* it by consensus. This decision-making procedure is commonly referred to as **“negative” or “reverse” consensus**.

4. The types of enhanced third party rights more commonly granted by panels include:

- **The right to attend the entirety of the first and second substantive meetings as observer.**
- **The right to receive a copy of the panel's questions to the parties and other third parties posed in the context of the first substantive meeting.**
- **The right to receive the written rebuttals (i.e. second written submissions) of the parties before the second meeting of the panel and the parties' replies to the panel questions.**
- **The right to make a brief statement in a special session set aside for third parties in the context of the second substantive meeting.**

II.E: The panel process

II.E.1: Rules on panel composition

Key provision:
Article 8 of the DSU

After a panel has been established by the DSB, it must be composed for each individual dispute. Panels are generally composed of three members; the DSU sets out detailed rules on panel composition:

DSU Article	Rule
Article 8.5	Five individuals, instead of three, can sit on a panel if the parties so request.
Article 8.6	The Secretariat proposes nominations to the parties to the dispute.
Articles 8.1 and 8.2	Potential candidates must meet certain requirements as regards their expertise and independence.
Article 8.4	The WTO Secretariat maintains an indicative list of names of governmental and non-governmental experts from which panelists may be drawn, as appropriate; other names may be considered as well. Members may periodically suggest additional names for inclusion on the indicative list.
Article 8.3	Citizens of a party or a third party to a dispute cannot serve as panelists without the agreement of the parties.
Article 8.10	In disputes opposing a developing- and a developed-country Member, the panel must, upon request by the former, include at least one panelist from a developing-country Member.

II.E: The panel process

II.E.2: Panel composition flowchart

The WTO Secretariat proposes nominations to the parties to the dispute.

Disagreement

Parties shall not oppose these nominations except for compelling reasons (Article 8.6 of the DSU).

Disagreement

The WTO Secretariat proposes a new slate of names (there is no review of the reasons given by the parties).

Disagreement

Agreement

Agreement

If the parties agree to the proposed names, the panel is composed. The WTO Secretariat circulates an official document in the WT/DS series, in which the names of the panelists are announced. This document also includes the panel's terms of reference and the list of Members having reserved their third party rights to participate in the panel proceedings.

If there is no agreement between the parties on the composition of the panel within 20 days after the date of the panel's establishment, **either party may request the WTO Director-General to determine the composition of the panel**. Within ten days of the receipt of such a request, the Director-General appoints the panel members in consultation with the chairperson of the DSB and the chairperson of the relevant Council or Committee, after consulting with the parties (Article 8.7 of the DSU). **This procedure prevents a respondent from delaying the panel proceedings by continuously objecting to the names of the panelists proposed**.

II.E: The panel process

II.E.3: Panel working procedures and timetable

Key provision:
Article 12.1-3 of the DSU

Once established and composed, the panel exists as a collegial body and can start its work with the assistance of the WTO Secretariat. **One of the first tasks of the panel is to draw up its working procedures** (Article 12.1 and 12.2 of the DSU) **and a timetable for its work** (Article 12.3 of the DSU).

Accelerated procedures are available pursuant to the Decision of 5 April 1966 (BISD 14S/18) when a developing country Member brings a complaint against a developed country Member and the developing country Member makes use of its right to invoke those accelerated procedures (Article 3.12 of the DSU). In addition, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides for accelerated procedures with several shorter time-periods with respect to disputes on prohibited subsidies and actionable subsidies.

TO KNOW MORE about panel working procedures and timetables, click here.

TO KNOW MORE: The panel's working procedures and timetable

One of the first tasks of the panel is to draw up the working procedures and the timetable for the dispute, in consultation with the parties. The panel will seek the parties' views on the working procedures and timetable at the "organizational meeting", which is generally held within a week or two from the time of the panel's composition.

Article 12 of the DSU encourages panels to follow the working procedures set out in Appendix 3 of the DSU. However, panels have a certain degree of flexibility to adopt any additional procedure specific to the panel (Article 12.1 of the DSU, paragraph 11 of Appendix 3). The DSU leaves panels a margin of discretion to deal with specific situations that may arise in a particular case and that are not explicitly regulated, provided that they act in accordance with due process (*). In practice, panels generally follow the working procedures of Appendix 3 of the DSU as they have evolved over time. The working procedures adopted by the panel may change in the course of the proceedings depending on the circumstances of the case. The same occurs with respect to the timetable, which sets dates and deadlines for the key stages of the panel process (e.g. the dates for the filing of the parties' written submissions, the meetings with the parties, or the issuance of the panel's interim and final reports).

The DSU foresees specific deadlines for the completion of the panel proceedings. As a general rule, a panel is required to issue its final report to the parties within six months from the date of its composition (and, as the case may be, from the date its terms of reference were agreed upon). In cases of urgency, including those related to perishable goods, the panel proceedings shall be completed within three months (Article 12.8 of the DSU). In practice, panel proceedings last 11 months on average. When the panel considers that it cannot issue its report within six months of the date of its composition (or three months in cases of urgency), it must inform the DSB in writing of the reasons for the delay and provide an estimate of the period within which it will issue its report. According to the DSU, the period from the establishment of the panel to the circulation of the report to the Members "should" in no case exceed nine months (Article 12.9 of the DSU). In practice, however, and leaving aside exceptionally lengthy disputes, that period is of 13 months including an average of 2 months for the selection of the panel.

Panels may suspend their work at any time at the request of the complaining party for a period not exceeding 12 months. If the suspension exceeds 12 months, the authority for the establishment of the panel shall lapse (Article 12.12 of the DSU).

(*) Appellate Body Report, EC-Hormones, footnote 138 to para. 152.

BACK TO COURSE

II.E: The panel process

II.E.4: Written submissions

Before the first substantive meeting and in accordance with the panel's timetable, each party submits a first written submission in which it presents the facts of the case and its arguments. The complainant is asked to present its submission first, followed by the respondent a few weeks later. **Third party submissions are usually due a few weeks after the respondent's first submission**. The parties' written submissions aim to clarify the facts of the case and contain the legal arguments, which often rely substantially on prior rulings of panels and the Appellate Body.

Some WTO Members make their written submissions available to the public. Click here for an example.

II.E: The panel process

II.E.5: Meetings with the parties

1: General considerations

The panel will meet with the parties and third parties in the course of the proceedings. The number of meetings will depend on the proceeding at issue. **The panel may also meet with the parties to hear experts (for instance in SPS proceedings), or to review the interim report. Panels have the discretion to call additional meetings with the parties if they consider it appropriate.**

Contrary to the practice in many domestic judicial systems, panel hearings are not usually held in public. The Working Procedures in Appendix 3 of the DSU foresee that panels meet in closed session. However, in recent years, some panels have opened their hearings to public observation, at the request of the parties. In these instances, panels have relied on the flexibility offered by Article 12.1 of the DSU to depart from the Working Procedures in Appendix 3, in consultation with the parties to the dispute.

II.E: The panel process

II.E.5: Meetings with the parties

Key provision:
Article 12 of the DSU

2: Sequence of meetings with the panel

Organizational meeting

The first meeting that the panel usually holds with the parties is called the "organizational meeting". During this meeting, the parties are given an opportunity to comment on the panel's proposed timetable and working procedures, before the panel finalizes them.

First substantive meeting

After the exchange of the first written submissions, the panel convenes a first meeting with the parties.

Second substantive meeting

The second meeting with the parties takes place after the second written submissions (or "rebuttals") are exchanged by the parties.

What happens at a substantive meeting? TO KNOW MORE, click here.

TO KNOW MORE: Substantive meetings with the panel

At the substantive meetings, the parties present their views orally, on the basis of a prepared statement distributed in writing to the panel and to the other parties. After making their oral statements, the parties are invited to pose questions to each other, through the panel, and to respond to questions from the panel. In addition, after the conclusion of each meeting, the parties are usually requested to submit written answers to the questions raised by the panel. In recent disputes, panels have also sent questions to the parties in advance of the meetings to encourage the parties to provide more detailed responses orally at the meetings.
The panel meetings take place at the WTO headquarters in Geneva. They are similar to an oral hearing before a court, although the setting is more informal. Each party and third party has the right to determine the composition of its own delegation when meeting with the panel. Each party and third party is also responsible for all members of its own delegation and must ensure that they act in accordance with the DSU and the working procedures, particularly with regard to the confidentiality of the proceedings.

Third party session: Article 10.2 of the DSU gives third parties the right to be heard by the panel. In practice, panel working procedures foresee that, after hearing the complainant(s) and the respondent, the panel will give third parties an opportunity to present their views orally during a special session set aside for that purpose at the first substantive meeting ("third party session“). This means that, under the normal procedures, third parties are not present in other parts of the first substantive meeting when the parties present their views orally. If the panel has opened the oral hearing for public observation, third parties may choose to speak either in a public session or in a confidential session. After the third parties have made their statements, the parties may be given the opportunity, through the panel, to ask them questions on any matter raised in their submissions or statements.

BACK TO COURSE

II.F: The panel report

II.F.1: General considerations

Once it has completed its assessment of the matter before it, the panel will issue its findings in the form of a written report to the DSB. **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.**

Panels make every effort to reach a consensus on the matter before them, and **most reports 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 (Article 14.3 of the DSU). In practice, there have been very few instances where this has occurred. The panel's deliberations are confidential and the final report is drafted in the absence of the parties to the dispute (Article 14.1 and 14.2 of the DSU).

TIP!

If the parties have reached a settlement during the course of the panel proceedings, the panel report will consist only of a brief description of the case. The report will also mention that the parties have reached a mutually agreed solution to the dispute.

II.F: The panel report

II.F.2: Phases in the preparation of the panel report

Key provision:
Article 15 of the DSU

Descriptive part of the report: The panel issues the descriptive part of the report to the parties for written comments (Article 15.1 of the DSU).

Interim review and report: Once it has received the parties' comments on the descriptive part, the panel will issue its interim report to the parties.

II.F: The panel report

II.F.2: Phases in the preparation of the panel report

Key provision:
Article 15 of the DSU

Descriptive part of the report:

The descriptive part of the panel report comprises an introduction, a summary of the factual aspects of the dispute as the panel understands them (draft factual findings), the parties' requests for findings by the panel, and a summary of the legal arguments of the parties and third parties. The parties are invited to make comments on the draft descriptive part (see Appendix 3 of the DSU). This gives the parties an opportunity to ensure that all of their key arguments are accurately reflected and to rectify any errors and perceived imprecisions.

Interim review and report:

The interim report, which is issued as a confidential document, includes the descriptive part, possibly amended to reflect comments submitted by the parties; the substantive findings of the panel, i.e. its findings on the applicability of relevant provisions and the basic rationale behind any findings and recommendations that the panel makes; the conclusions and recommendations of the panel, and, as the case may be, suggestions for implementation. As with the descriptive part, parties are entitled to make comments on the interim report. The parties may also request a meeting with the panel to further argue specific points raised with respect to the interim report. This is the “interim review stage” (Article 15 of the DSU). The interim review is the last opportunity for the parties to seek the rectification of any factual mistakes in the panel report. If no comments are received, the interim report will become the final report of the panel (Article 15.2 of the DSU).

II.F: The panel report

II.F.3: Structure of the report

Once the interim review stage has concluded, the panel will finalise its report for issuance to the parties only. **This "final" report will include the descriptive part, a section summarizing the parties' comments on the interim report and the panel's response, the panel's findings (as amended, if necessary, further to the parties' comments), and the corresponding conclusions and recommendations**. The report will only be circulated to the Members once it is available in the three official languages of the WTO (English, French and Spanish). At that point, it also becomes a public document, issued under the WT/DS series (the document symbol for the final report ends with an "R", i.e. WT/DS###/R).

II.F: The panel report

II.F.4: Findings and recommendations

Key provisions:
Articles 12.7 and 19.1 of the DSU

The most important part of the panel report is the section containing the "findings", that is, the panel's determinations on the factual and legal issues before it. The DSU requires panels to set out the basic rationale behind any findings and recommendations that they make (Article 12.7 of the DSU). **If the panel concludes that the challenged measure is inconsistent with a covered agreement, the report will contain a recommendation to the DSB that the responding Member bring the challenged measure into conformity with that agreement** (Article 19.1 of the DSU, first sentence), unless the measure has since been removed. In its report, the panel may also suggest ways in which the Member concerned could comply with the panel's recommendations (Article 19.1 of the DSU, second sentence).

To become legally binding, panel reports have to be adopted by the DSB.

Test your knowledge!

Complete the following statements.

1. There are no permanent panels or panelists in the WTO. Therefore, a new panel must be composed for _____.

2. If there is no agreement between the parties on the composition of the panel, either party may request the _____ to determine the composition of the panel.

3. In the WTO, _____are not usually held in public; however, in recent years, some panels have opened their hearings to public observation, at the request of the parties.

4. Under the DSU, the panel is mandated to make an objective assessment of the matter before it, including _____ and the applicability of and conformity with the relevant covered agreements.

5. After receiving the parties' comments on the descriptive part, the panel issues its _____ to the parties.

Test your knowledge!

Answer:

1. There are no permanent panels or panelists in the WTO. Therefore, a new panel must be composed for **each individual dispute**.

2. If there is no agreement between the parties on the composition of the panel, either party may request the **WTO Director-General** to determine the composition of the panel.

3. In the WTO, **oral hearings** are not usually held in public; however, in recent years, some panels have opened their hearings to public observation, at the request of the parties.

4. Under the DSU, the panel is mandated to 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.

5. After receiving the parties' comments on the descriptive part, the panel issues its **interim report** to the parties.

II.G: Takeaway message from Lesson 2

Lesson 2 has discussed the following key points:

- The complaining party may request the establishment of a panel to adjudicate the dispute only if consultations have failed to settle the matter between the parties.
- The preparation of the panel request is of crucial importance: If the claims or measures are not identified with sufficient clarity in the panel request, the respondent may request the panel to rule that such claims or measures are not within the panel's jurisdiction.
- The panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.
- The rule of "negative" or "reverse" consensus means that a panel will be established by the DSB if a Member so requests.
- Members that are not parties to a dispute can still be heard by panels and make written submissions as third parties, even if they have not participated in the consultations between the parties.
- Accelerated procedures are available pursuant to the Decision of 5 April 1966 (BISD 14S/18) when a developing country Member brings a complaint against a developed country Member and the developing country Member makes use of its right to invoke those accelerated procedures.
- The panel report includes the panel's "findings", i.e. the panel's determinations on the factual and legal issues before it. It also sets out the basic rationale behind such findings. If the panel concludes that the challenged measure is inconsistent with a covered agreement, the report will contain a recommendation to the DSB that the responding Member bring the challenged measure into conformity with that agreement.

II.H: Suggested readings and resources

References for Lesson 2:

- The Understanding on Rules and Procedures Governing the Settlement of Disputes: http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm
- Rules of Conduct: http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm
- Understanding the WTO – The WTO dispute settlement system: a unique contribution: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
- More on dispute settlement: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- The WTO dispute settlement system training module: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm
- Video – Case studies: http://www.wto.org/english/res_e/webcas_e/webcas_e.htm#intro

LESSON 3

Appellate review: the main features

Introduction

One of the most noteworthy features of the DSU is the possibility for Members to appeal the panel report to the Appellate Body. The Appellate Body process is the second and final stage in the adjudicatory part of the DSS.

Adjudication → Appellate Review Art. 17 of the DSU and Working Procedures for Appellate Review (WT/AB/WP/6)

The Working Procedures (WP) for Appellate Review contain the detailed procedural rules for appeals. These range from the duties and responsibilities of Appellate Body members to the specific deadlines by which submissions must be filed in an appeal. These procedures should not be confused with the panel WP in Appendix 3 to the DSU.

Function of the Appellate Body and scope of appellate review

III.A: Function of the Appellate Body and scope of appellate review

Key provision:
Article 17 of the DSU

Function of the Appellate Body and scope of appellate review

"The Appellate Body is entrusted with the task of reviewing the legal aspects of the reports issued by panels.
Appeals are therefore limited to legal questions. An appeal cannot address the facts on which the panel report is based, for example, by requesting the examination of new factual evidence or by re-examining existing evidence.
The distinction between legal and factual questions is therefore important in defining the scope of appellate review. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. In doing so, it also provides consistency of decisions, which is in line with the objective of providing predictability to the system."

III.B: Who has the right to file an appeal?

Article 17.4 of the DSU provides that only the parties to the dispute, not the third parties, can appeal the panel report. Both the "winning" and the "losing" party (i.e. more than one party) can appeal a panel report. Multiple appeals can also be filed. The generic term for parties participating in the appeal as appellant or appellee is "participants“.

III.C: Third participants

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 also participate in the appeal as "third participants" and thus may make written submissions to, and be given an opportunity to be heard by, the Appellate Body**. A WTO Member that has not been a third party at the panel stage is excluded from participation in the appellate review. A third party now is not required to file a third participant's submission in order to be entitled to attend the oral hearing before the Appellate Body.

TO KNOW MORE about third participants, click here!

TO KNOW MORE: Third participants in appellate proceedings

A third party has the following options if it wants to become a third participant in appellate proceedings (Rules 24 and 27 of the WP):

- file a third participant's submission within 21 days of the notice of appeal, appear at the oral hearing and make an oral statement, if desired; or
- not file any submission, but notify the Appellate Body Secretariat in writing and within 21 days if it intends to appear at the oral hearing, and to make an oral statement, if desired;
- not file any submission, and not make any notification within 21 days, but notify the Appellate Body Secretariat, preferably in writing and at the earliest opportunity, of the intention to appear at the oral hearing and request to make an oral statement, and make an oral statement if the Appellate Body has acceded to the request;
- not file any submission, and not make any notification within 21 days, but notify the Appellate Body Secretariat, preferably in writing and at the earliest opportunity, of the intention to appear at the oral hearing (without making an oral statement).

BACK TO COURSE

III.D: Composition of the Appellate Body Division

Article 17.1 of the DSU provides that **three of the seven Appellate Body members serve on each appeal and that the seven members serve in rotation as further specified in the WP**. Even if only the three members comprising the particular Division for an appeal will take the final decision, this will only be done after having discussed the case with all other Appellate Body members.

While, at the panel stage, persons holding the citizenship of a party or third party cannot serve as panelists, except with the agreement of the parties, the Appellate Body members can be citizens of WTO Members involved in many disputes as either parties or third parties.

III.E: How does the appeal process begin?

Notice of appeal: The appeal process begins when "a party to the dispute formally notifies the DSB of its decision to appeal“. **Rule 20(1) of the WP requires a simultaneous filing of a notice of appeal and a written submission with the Appellate Body Secretariat**, which is circulated within the WT/DS series. The party that has filed a notice of appeal is known as an "appellant".

Notice of “other appeal”: It is often the case that another party chooses to cross-appeal (Rule 23 of the WP). This second notice of appeal, known as "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 includes the same requirements as in Rule 20(2)(d)**. The notice of other appeal is also circulated to Members within the WT/DS series.

III.E: How does the appeal process begin?

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. As regards the content of the notice of appeal, Rule 20(2)(d) of the WP requires that a notice of appeal include a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel. In addition, the notice must include the list of provisions where the panel erred and an indicative list of the paragraphs containing the alleged errors. The notice of appeal thus serves as the "trigger" for initiating the appeal and ensures that the appellee also receives notice, albeit brief, of the "nature of the appeal" and the "allegations of errors" by the panel.

III.F: Requirements for written submissions

Written submissions must include (Rule 21(2) of the WP):

(i) a precise **statement of the grounds for the 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**.

In case of cross-appeal, the "other appellant" files a written submission within five days of the filing of the notice of appeal (Rule 23(1) of the WP). Within 18 days from the notice of appeal, any party to the dispute that wishes to respond to allegations raised in an appellant's submission can file a written submission (Rule 22(1) of the WP). Any third participant wishing to file a written submission setting forth their position and legal arguments must do so within 21 days from the notice of appeal.

III.G: Oral hearings

Approximately 30 to 45 days after the notice of appeal, the Appellate Body division assigned to the case holds an oral hearing (Rule 27(1) of the Working Procedures). **At the oral hearing, the participants and third participants each make a brief opening statement, after which the Appellate Body poses questions to the participants and third participants**. 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 consented to open the oral hearing for public observation, always at the request of the participants.

III.H: Deliberations of the Appellate Body

Following the exchange of views with the other Appellate Body members, the division concludes its deliberations and the Appellate Body report is drafted. All deliberations of the Appellate Body are confidential. **The WP for Appellate Review also envisage that members of the Appellate Body must make every effort to take their decisions by consensus. Where this is not possible, the matter at issue shall be resolved through a majority vote** (Rule 3(2) of the WP). If an individual Appellate Body member includes a separate opinion in the report, it must be done anonymously (Article 17.11 of the DSU).

III.I: Duration of proceedings

Article 17.5 of the DSU provides that **appellate review proceedings must generally be completed within 60 days, and in no case exceed 90 days from the date when the notice of appeal was filed**. When an appellate procedure takes more than 60 days, the Appellate Body must inform the DSB of the reasons for the delay and give an estimate of the time until circulation of the report (Article 17.5 of the DSU). The SCM Agreement provides for a shorter appellate deadline in disputes on prohibited subsidies (Article 4.9 of the SCM Agreement).

III.J: The Appellate Body report

An Appellate Body report usually contains an overview of the measures at issue and a description of the arguments of the parties. Most importantly, it **includes a findings section where the Appellate Body addresses in detail the issues raised on appeal, sets out its conclusions and reasoning in support of such conclusions, and states whether the appealed panel findings and conclusions are upheld, modified or reversed**.

What happens next?

Where it concludes that the challenged measure is inconsistent with a covered agreement, the Appellate Body recommends that the responding Member bring the inconsistent measure into conformity with its corresponding obligations (Article 19.1 of the DSU, first sentence).

These recommendations are addressed to the DSB, which then requests the Member concerned to bring its measure into conformity with the relevant provisions of WTO law.

After the report is finalized and signed by the members of the Appellate Body Division hearing the case, it is translated into the two other official languages of the WTO. This report then becomes a public WT/DS document (the symbol ends with "AB/R", thus WT/DS###/AB/R).

III.K: Adoption of reports by the DSB

Key provisions:
Articles 16 and 17.14 of the DSU

Panel and, where appealed, Appellate Body reports become binding on the parties to the dispute only after the DSB has adopted them. The DSB must adopt the panel report no earlier than 20 days, but no later than 60 days, after the date of its circulation to the Members, *unless* a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report (Article 16.4 of the DSU). In disputes regarding prohibited or actionable subsidies, special rules apply (Articles 4.8 and 7.6 of the SCM Agreement).

When appealed, the panel report cannot yet be adopted, given that the Appellate Body could modify or reverse it. In that case, the panel report will be considered for adoption by the DSB only after completion of the appeal and together with the Appellate Body report (Article 16.4 of the DSU).

III.K: Adoption of reports by the DSB

Panel report

To be adopted in a DSB meeting, a panel report (which has not been appealed) must be placed on the agenda of a DSB meeting. After the establishment of the panel, this is the second key instance in which the decision-making rule of reverse consensus applies in the WTO DSS. The adoption of panel reports is in fact "quasi-automatic“.

Appellate Body report

The DSB must then adopt, and the parties must unconditionally accept, the Appellate Body report unless the DSB decides by consensus not to adopt it within 30 days following its circulation to Members (*). Thus, both reports are placed on the DSB agenda for adoption, and the DSB adopts the Appellate Body report together with the panel report, as upheld, modified or reversed by the Appellate Body report.

III.L: Legal effects of reports adopted by the DSB

Key provision:
Article 3.2 of the DSU

After the DSB adopts the report/s, the recommendations and rulings contained in those reports become binding *upon the parties* to the dispute, not on other WTO Members. However, **subsequent panels are not free to disregard the legal interpretations and the reasoning contained in previous Appellate Body reports**. As the Appellate Body has explained, following the reasoning and conclusions of Appellate Body reports in earlier disputes "is not only appropriate, but is what would be expected from panels, especially where the issues are the same" (*). In this respect, 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.

(*) Appellate Body Report, US – Oil Country Tubular Goods Sunset Reviews, para. 188.

III.L: Legal effects of reports adopted by the DSB

Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case". (Appellate Body Report, US – Stainless Steel (Mexico), paras. 158-162).

Test your knowledge!

Complete the following statements!

1. The Appellate Body cannot address the facts on which the panel is based, instead it has to focus on the _____.

2. Only the _____ can appeal the panel report.

3. Only third parties that have participated in the panel stage may participate in the appeal as _____.

4. The process of appeal begins with a _____ submitted by the appellant.

5. The situation where the other appellant files a written submission is called _____.

6. The deliberations of the Appellate Body are _____.

7. The Appellate Body provides consistency of decisions which is in line with the objective of providing _____ of decisions.

Test your knowledge!

Answer:

1. The Appellate Body cannot address the facts on which the panel is based, instead it has to focus on the **legal aspects**.

2. Only the **parties to the dispute** can appeal the panel report.

3. Only third parties that have participated in the panel stage may participate in the appeal as **third participants**.

4. The process of appeal begins with a **notice of appeal** submitted by the appellant.

5. The situation where the other appellant files a written submission is called **cross-appeal**.

6. The deliberations of the Appellate Body are **confidential**.

7. The Appellate Body provides consistency of decisions which is in line with the objective of providing **predictability** of decisions.

III.M: Takeaway messages from Lesson 3

The following key points have been discussed in Lesson 3:

- One of the most noteworthy features of the DSU is the possibility for Members to appeal the panel report before the Appellate Body. The Appellate Body is the second and final stage in the adjudicatory part of the DSS.
- An appeal cannot address the facts on which the panel report is based, for example, by requesting the examination of new factual evidence or by re-examining existing evidence.
- Only the parties to the dispute, not the third parties, can appeal the panel report.
- Members that have been third parties at the panel stage may also participate in the appeal as "third participants".
- The appeal process begins when "a party to the dispute formally notifies the DSB of its decision to appeal". Rule 20(1) of the WP requires a simultaneous filing of a notice of appeal and a written submission with the Appellate Body Secretariat.
- Members of the Appellate Body and its divisions must make every effort to take their decisions by consensus. Where this is not possible, a majority vote takes place.
- Panel and, where appealed, Appellate Body reports become binding on the parties to the dispute only after the DSB has adopted them.
- Subsequent panels are not free to disregard the legal interpretations and the reasoning contained in previous Appellate Body reports.

III.N: Suggested readings and resources

References for Lesson 3:

- The Understanding on Rules and Procedures Governing the Settlement of Disputes: http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm
- Working Procedures for Appellate Review: http://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm
- Understanding the WTO – The WTO dispute settlement system: a unique contribution http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
- More on dispute settlement: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- The Appellate Body: http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm
- The WTO dispute settlement system training module: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm

WTO/OMC
E-LEARNING

Module 4:
Compliance with Recommendations and Rulings of the Dispute Settlement Body

Start…

Welcome & Objectives

Welcome to Module 4 on the mechanisms established under the WTO Dispute Settlement System (DSS) to ensure that the recommendations and rulings of the Dispute Settlement Body (DSB) are properly implemented. By studying this module and taking the exam you will be able to, for instance:

Make a presentation on the compliance and enforcement mechanisms available in the WTO DSS;

Find key documents related to implementation and enforcement**,** including decisions by WTO tribunals; and

Set the starting point to advise your administration on various aspects of the WTO DSS compliance mechanisms.

Structure

This module is divided into **three lessons**:

Lesson 1

How are recommendations and rulings of the DSB implemented?

Lesson 2

What happens in case of disagreement on compliance?

Lesson 3

What are the remedies for non-compliance?

LESSON 1

How are recommendations and rulings of the DSB implemented?

Introduction

Key provision:
Article 19.1 of the DSU

Where a violation complaint has been successful, the adoption of the panel (and Appellate Body) report(s) by the DSB leads to "recommendations and rulings" by the DSB addressed to the respondent, to bring the measures into conformity with the relevant covered agreement(s) (Article 19.1 of the Dispute Settlement Understanding - DSU).(*)

(*) In the case of a successful non-violation complaint, the recommendation will be that the respondent make a mutually satisfactory adjustment (Article 26.1(b) of the DSU).

I.A: Prompt compliance

I.A.1: The general rule

Key provisions:
Articles 3.7 and 21.1 of the DSU

Article 21.1 of the DSU states that *prompt compliance* with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes for the benefit of all WTO Members. In the case of violation complaints, t**he concept of "compliance" as well as that of "implementation" have been interpreted as the withdrawal or modification of the WTO-inconsistent measure** (*). Accordingly, to comply with recommendations or rulings of the DSB, a WTO Member may have different options, including:

- ✓ **The withdrawal of the WTO-inconsistent measure; or**
- ✓ **The modification of the WTO-inconsistent measure.**

(*) Award of the Arbitrator, Argentina – Hides and Leather (Article 21.3(c)), paras. 40-41; Award of the Arbitrator, US – Offset Act (Byrd Amendment) (Article 21.3(c)), para. 49.

I.A: Prompt compliance

I.A.2: The case of “prohibited” and “actionable” subsidies

Key provisions:
Articles 4.7 and 7.8 of the SCM Agreement

Where the measure at issue has been found to be a subsidy prohibited by the SCM Agreement (Article 3 of the SCM Agreement), **the DSB is to recommend that the subsidizing Member withdraw the subsidy "without delay"** (Article 4.7 of the SCM Agreement). The other exception to the general rule concerns actionable subsidies as defined in the SCM Agreement (Article 5.1 of the SCM Agreement). In the event that a subsidy is found to have resulted in adverse effects, the respondent has two options to come into compliance: either to take appropriate steps to remove the adverse effects within six months from the date of adoption of the panel report or Appellate Body report, or to withdraw the subsidy within the same timeframe (Article 7.8 and 7.9 of the SCM Agreement).

I.B: Intentions as to compliance with DSB recommendations and rulings

Key provision:
Article 21.3 of the DSU

Within 30 days after the adoption of the Appellate Body and/or panel report(s), the responding Member is to inform the DSB about its intentions regarding the implementation of the DSB's recommendations and rulings. If the Member concerned states that it has been able to comply immediately with the recommendations and rulings, no further action is expected from that Member. However, immediate compliance through withdrawal or modification of the WTO-inconsistent measure is frequently not practicable, e.g. because compliance may be achievable only by recourse to domestic legislative procedures. As a consequence, **where immediate compliance is "impracticable" (*), Members are entitled to a reasonable period of time for implementation** (Article 21.3). As explained below, there are specific procedures for establishing the length of any reasonable period of time to be granted.

(*) Award of the Arbitrator, US-Offset Act (Byrd Amendment), para. 40.

I.C: The reasonable period of time

General considerations

The reasonable period of time (RPT) is a period granted to the respondent for bringing its measures into compliance. **During that period, the respondent cannot be the target of any countermeasures.** Six months after the establishment of the RPT, the issue of compliance is to be placed on the agenda of the DSB and the respondent is expected to report, in writing, to the membership on its progress towards compliance at each regular DSB meeting until the issue is resolved (Article 21.6) (*).

(*) When the “reasonable period of time” for implementation has been agreed upon by the parties or decided by a WTO arbitrator, the Member concerned has to keep the DSB informed about its progress in implementing the recommendations and rulings of the DSB.
A written “status report” is therefore circulated by the Member concerned 10 days before a regular meeting of the DSB takes place, pursuant to Article 21.6 of the DSU. In general, these reports have tended to be relatively concise, but they are important because they create transparency and support the multilateral surveillance process.
See here for an example of a Status Report.

I.C: The reasonable period of time

Key provisions:
Article 21.3 (a), (b), and (c) of the DSU

Mechanism	Deadline	DSU provision	Comments
1. Proposed by the Member concerned (respondent) and approved by the DSB	Normally within 30 days of adoption of the panel or Appellate Body report(s)	Article 21.3(a)	The first option, approval by the DSB, has so far never been used.
2. Mutually agreed by the parties to the dispute	Within 45 days of adoption of report(s). Time-period to agree is often extended by agreement; see e.g. WT/DS414/9	Article 21.3(b)	This mechanism is available in the absence of DSB approval. It is the option followed by the parties to a dispute in the majority of cases.
3. Determined through binding WTO arbitration	Within 90 days of adoption of report(s)	Article 21.3(c)	If the parties cannot agree on the length of the RPT, either of them may resort to arbitration.

I.D: WTO arbitration to determine the RPT

I.D.1: Appointment and tasks of the WTO arbitrator

Key provision:
Article 21.3 (c) of the DSU

Appointment of an Arbitrator: While the procedure may be initiated at the request of either party, it is typically the complaining party that submits the request for arbitration. The request is addressed to the chairperson of the DSB. Although the arbitrator can be an individual or a group of individuals, **all arbitrators thus far under this provision 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 WTO Director-General appoints the arbitrator within another ten days after consulting the parties (Footnote 12 to Article 21 DSU).

Task: **The arbitrator's task is to determine the reasonable period of time within which implementation must be completed**.

TIP!

Note that **if the parties reach a mutually agreed solution when arbitration procedures have already been initiated, the latter can be suspended at any time.** This provides the parties with an opportunity to reach an agreement on the RPT and communicate it to the DSB. The **DSU clearly favours mutually agreed solutions**. This applies also to the case of arbitration proceedings under **Article 21.3 (c)**. Even if a WTO arbitrator determines the RPT, the parties may subsequently agree, with DSB approval, to extend it further. See e.g. **WT/DS184/18**.

I.D: WTO arbitration to determine the RPT

I.D.2: How long is “reasonable”?

Key provision:
Article 21.3 (c) of the DSU

The DSU establishes as a general guideline that the reasonable period of time should not exceed 15 months from the date of adoption of the report(s). The RPT can be shorter or longer, however, depending on the "particular circumstances". Noting the requirement of "prompt compliance" of Article 21.1 of the DSU, several WTO arbitrators have held that:

- The reasonable period of time should be **the shortest period of time possible within the legal system of the implementing Member.** (*)
- The implementing **Member must utilize all the flexibility** and discretion available **within its normal domestic procedures in order to implement within the shortest period of time possible**; (**) and
- **The “particular circumstances” of the case must be taken into account in determining the reasonable period of time, including whether the implementing Member is a developing country.**

(*) See e.g. Award of the Arbitrator, Indonesia – Autos (Article 21.3(c)), para. 22.

(**) See e.g. Award of the Arbitrator, Canada – Autos (Article 21.3(c)), para. 47.

I.D: WTO arbitration to determine the RPT

I.D.3: Role of the implementing Member

The implementing Member bears the burden of showing that the duration of any proposed period for implementation constitutes a “reasonable” period of time. **The longer the proposed period of implementation, the greater this burden**(*). However, this initial burden does not absolve the complainant from producing evidence in support of its contention that the period of time requested by the implementing Member is not "reasonable", and that a shorter period of time is warranted (**).

(*)See e.g. Award of the Arbitrator, US – 1916 Act (Article 21.3(c)), para. 32.

(**) Award of the Arbitrator, Colombia – Ports of Entry (Article 21.3(c)), para. 67.

Test your knowledge!

Answer the following questions in your own words and without looking at your notes:

1. What does “prompt compliance” mean?

2. If a reasonable period of time for implementation is needed, who decides how long the reasonable period should be? According to which procedure?

Test your knowledge!

Answer:

1. What does “prompt compliance” mean?

   Prompt compliance is a principle inscribed in various provisions of the DSU, such as Article 21.1 thereof. It means that, wherever practicable, WTO Members are expected to give immediate effect to the recommendations and rulings of the DSB that indicate that one or several of their measures are in breach of one or several provisions of the covered agreements.

2. If a reasonable period of time for implementation is needed, who decides how long the reasonable period should be? According to which procedure?

   The reasonable period of time can be established through three mechanisms. First, it can be proposed by the implementing Member within 30 days of the adoption of a panel and/or Appellate Body report and approved by the DSB. Second, in the absence of DSB approval, it can be mutually agreed by the parties to the dispute. Third, if mutual agreement is not possible, it can be determined through binding WTO arbitration.

I.E: Takeaway messages from Lesson 1

Lesson 1 has discussed the following key points:

- A WTO Member whose measure has been found to be inconsistent with the covered agreements may have several options to comply with the recommendations and rulings of the DSB; they include withdrawing or modifying the measure at issue. Where the WTO-inconsistent measure is found to be a subsidy that is either prohibited or actionable under the SCM Agreement, special rules will apply.
- WTO Members are entitled to a reasonable period of time for implementation (RPT) where immediate compliance is “impracticable”. During the RPT, the respondent cannot be the target of countermeasures.
- The RPT can be (1) proposed by the respondent and approved by the DSB; (2) agreed between the parties; or (3) decided through binding WTO arbitration. The second option is followed by WTO Members in the majority of cases.
- In case of arbitration on the RPT, the arbitrator's task is limited to determining the reasonable period of time within which implementation must be completed.
- The implementing Member bears the burden of showing that the duration of any proposed period for implementation constitutes a reasonable period of time.

I.F: Suggested readings and resources

References for Lesson 1:

- WTO Dispute Settlement System Training Module:
  http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm
- WTO Analytical Index: interpretation of the DSU:
  http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_e.htm

Further readings and resources:

- "Re-assessing WTO remedies: the prospective and the retrospective", by Vidigal, Geraldo, in Journal of International Economic Law, 16(3), 505–534, (July 2013)
- "Trade Law and Development, special issue: Dispute Settlement at the WTO":
  http://www.tradelawdevelopment.com/index.php/tld/issue/view/4%281%29%20TL%26D%20%282012%29

LESSON 2

What happens in case of disputes over compliance?

Introduction

Key provision:
Article 21.5 of the DSU

If the parties disagree on whether the respondent has implemented the recommendations and rulings of the DSB (*), either of them can request a panel under Article 21.5 of the DSU to decide this dispute. This procedure is referred to as "compliance" panel procedure.

(*) In general parties wait until the expiry of the RPT before initiating compliance panel proceedings under Article 21.5 of the DSU. See Lesson 3.

TIP!
Such disagreements can arise if, for instance, a new regulation or law has been passed and the respondent believes that this has resulted in full compliance, but the complainant(s) disagree(s).

II.A: The compliance panel

II.A.1: General considerations

Article 21.5 **of the DSU provides that a disagreement "as to the existence or consistency with a covered agreement 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 provision has been interpreted in practice as a reference to the procedures governing original disputes, though with a different time-line and a requirement to use the members of the original panel, wherever possible.

II.A: The compliance panel

II.A.2: Scope of proceedings

The Appellate Body has clarified that the panel's task in compliance proceedings pursuant to Article 21.5 of the DSU is not limited to examining whether the implementing measure fully complies with the recommendations and rulings adopted by the DSB; rather, **compliance panels must consider the new measure in its totality, including its consistency with a covered agreement** (*). This means that the claims raised under Article 21.5 panel proceedings may be *new* or *different* from the original ones.

(*) Appellate Body Reports, *Canada – Aircraft (Article 21.5)*, paras. 40-41; Appellate Body Report, US – Shrimp (Article 21.5 – Malaysia), paras. 85-87.

II.A: The compliance panel

II.A.2: Scope of proceedings

Canada – Aircraft (Article 21.5)

In *Canada – Aircraft (Article 21.5)*, para. 41, the Appellate Body held that "… in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the "measure taken to comply" will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.“

II.A: The compliance panel

II.A.3: Duration of proceedings

The panel is expected to rule in an expedited fashion, normally within 90 days (*). Compliance panel proceedings pursuant to Article 21.5 of the DSU usually involve only one substantive meeting that takes place after the parties have exchanged two sets of written submissions. **The timetable in compliance panel proceedings pursuant to Article 21.5 of the DSU therefore differs from that in original panel proceedings, indicating that these proceedings are expected to be completed in a shorter timeframe.**

(*) Note, however, that in practice this deadline is frequently exceeded. This is because compliance panel proceedings are often no less complex than original panel proceedings.

II.A: The compliance panel

II.A.4: Consultations and appeal in Article 21.5 proceedings?

- ✓ **Consultations?** The DSU does not explicitly state whether compliance panel proceedings must be preceded by consultations where at least one party considers that consultations could settle the dispute. In practice, **parties often conclude an *ad hoc* agreement on procedures under Articles 21 and 22 of the DSU to be applied to their dispute**. Such agreements frequently lay down a requirement to hold consultations on an expedited basis, before requesting the establishment of a compliance panel. These procedural agreements also usually contain arrangements concerning various aspects 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 at which the request is on the DSB's agenda.

- ✓ **Appeal?**: Although Article 21.5 is silent on the availability of appellate review in compliance proceedings, in practice **the Appellate Body has accepted appeals from compliance panel reports** (*).

II.B: Takeaway messages from Lesson 2

Lesson 2 has discussed the following key points:

- Either party can request a panel under Article 21.5 of the DSU.
- Article 21.5 of the DSU provides that disputes over compliance are to be solved "through recourse to these dispute settlement procedures", including, wherever possible, recourse to the original panel. The Appellate Body has clarified that compliance panels must consider the consistency of measures taken to comply in their totality, including by reviewing new claims of inconsistency with a covered agreement.
- Compliance proceedings are expected to be completed in a short timeframe.
- Parties often conclude an *ad hoc* agreement on procedures under Articles 21 and 22 of the DSU to be applied to their dispute.
- The Appellate Body has accepted appeals from compliance panel reports.

Summary-flow chart of the compliance panel process:

Panel request

Where there is a dispute over compliance

→

Panel composed

In principle, with the members of the original panel

→

Panel report to be issued within 90 days

In reality, the compliance panel process often takes longer

→

Appellate review

Not established in the DSU, but through practice. Appellate Body under the same deadlines as for standard appeals

BACK TO COURSE

II.C: Suggested readings and resources

References for Lesson 2:

- Dispute Settlement System training module: chapter 6:
  http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s7p2_e.htm
- WTO Analytical Index: interpretation of the DSU:
  http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_e.htm

Further readings and resources:

- "Re-assessing WTO remedies: the prospective and the retrospective", by Vidigal, Geraldo, in Journal of International Economic Law, 16(3), 505–534, (July 2013)
- "Trade Law and Development, special issue: Dispute Settlement at the WTO":
  http://www.tradelawdevelopment.com/index.php/tld/issue/view/4%281%29%20TL%26D%20%282012%29

LESSON 3

What are the remedies for non-compliance?

Introduction

Key provisions:
Articles 3.7 and 22 of the DSU

There are two types (*) of *temporary remedies* in cases where a violation has been found, but the respondent has not yet brought the infringing measure(s) into compliance with the covered agreements:

1. **Seeking compensation** (Article 22.2 of the DSU); or, where compensation cannot be agreed upon,
2. **Requesting from the DSB an authorization to suspend concessions or other WTO obligations** (Articles 3.7, 22.2 and 22.6 of the DSU).

Neither of these temporary measures is preferred to full implementation of DSB recommendations and rulings (Articles 3.7 and 22.1 of the DSU).

(*) Note that another typology of remedies exists for disputes under certain provisions of the SCM Agreement, as discussed later in this Lesson.

Introduction

WTO Members are currently debating whether recourse to such additional remedies is conditional on a finding under Article 21.5 of the DSU that the implementing Member has not fully implemented measures that would repair the original violation. This issue is called "sequencing" in WTO parlance. This issue is currently solved through *ad hoc* agreements between WTO Members.

III.A: Compensation

Key provisions:
Articles 21 and 22.2, first sentence, of the DSU

If the implementing Member does not achieve full compliance by the end of the reasonable period of time, it has to enter into negotiations with the complaining party, if the latter so requests, with a view to agreeing a mutually acceptable compensation (Article 22.2 of the DSU). **Compensation pursuant to Articles 21 and 22 of the DSU must be:**

- ✓ **WTO-consistent** (i.e. it has to comply with all WTO agreements and rules contained therein, including non-discrimination requirements); and
- ✓ **Mutually agreed**.

III.A: Compensation

Mutually agreed

In practice to date, such compensation has hardly been used in cases reaching this stage. Conformity with the covered agreements implies, among others, consistency with the most-favoured-nation (MFN) obligations (Article I of GATT 1994, for example). Where relevant, this may imply that WTO Members other than the complainant(s) would also need to 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, for whom this raises the "price", and the complainant, who does not get an exclusive benefit. Moreover, the short time-period foreseen in the DSU to reach an agreement on compensation may also explain the infrequent recourse to this form of remedy to date. In a limited number of disputes, parties have agreed on temporary monetary arrangements, which have been described as compensation.

III.B: Retaliation (suspension of concessions or other obligations)

III.B.1: General considerations

Key provisions:
Articles 21, 22.2 (second sentence) and 22.8 of the DSU

If there is no agreement on compensation within 20 days from the expiry of the reasonable period of time, the complainant can request the suspension of "concessions" or other WTO obligations, i.e. seek from the DSB an authorization to impose retaliation measures. **These measures are clearly considered a "last resort"** (Article 3.7 of the DSU), which can be used only where an authorization to that effect has been accorded by the DSB. **It is also clear that they are of a temporary nature, and that the matter they intend to temporarily redress remains on the agenda of the DSB for as long as needed** (Article 22.8). **Their purpose**, in other words, **is one of inducing compliance with the original recommendations and rulings of the DSB (*). They are to be promptly revoked once full compliance has been has been achieved (**)**. The authorization to suspend concessions and other obligations is therefore granted with the proviso that a number of specific principles and conditions are respected by the requesting Member.

TIP!
What is a "concession"? "Concessions" are, for example, tariff reduction commitments which WTO Members have made in multilateral trade negotiations and are bound under Article II of GATT 1994. These bound concessions are just one form of WTO obligations.

Does retaliation make good economic sense?

(**) Appellate Body Reports, *US/Canada – Continued Suspension*, para. 355.

(*) Decision by the Arbitrators, EC – Bananas III (US) (Article 22.6 – EC), para. 76; Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada), para. 3.105.

III.B: Retaliation (suspension of concessions or other obligations)

III.B.2: Does retaliation make good economic sense?

Does retaliation make good economic sense?

"Most observers agree that suspending obligations in response to the failure of timely implementation is problematic.
This is the case because it usually results in the complainant responding to a (WTO-inconsistent) trade barrier with another trade barrier, which is contrary to the liberalization philosophy underlying the WTO.
Measures erecting trade barriers come at a price, because they are nearly always economically harmful not only for the targeted Member, but also for the Member imposing those measures.
That said, it is important to note that it is the last resort in the dispute settlement system and is not actually used in most cases.
It is clearly the exception, not the rule, for a dispute to go this far and not be resolved at an earlier stage through more constructive means."

III.C: Stages, principles and procedures governing countermeasures

III.C.1: The request by the complainant

Key provision:
Article 22.6 of the DSU

The request

Upon request, the DSB must grant the authorization to suspend obligations within 30 days of the expiry of the reasonable period of time, unless it decides by consensus to reject the request (Article 22.6 of the DSU). This is the third key situation where the DSB decides by "reverse" or "negative" consensus. In other words, the approval is virtually automatic, because the requesting Member alone could prevent any possible consensus against granting the authorization.

The potential objection

However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, the matter will be referred to arbitration (under Article 22.6 of the DSU), which will need to be completed before the DSB can authorize retaliation.

What could be the principles and procedures set forth in Article 22.3? Try to guess the answer before moving on!

III.C: Stages, principles and procedures governing countermeasures

III.C.2: Core requirements

Key provision:
Article 22.3-4 of the DSU

When a complaining Member is considering whether to retaliate, there are two elements that it needs to consider:

- First, **a quantitative requirement**, i.e. the level of suspension that can be authorized.

- Second, **a qualitative requirement**, i.e. in which sector, and under which agreement, can WTO obligations be suspended. This leaves the complainant with the choice to decide, provided certain conditions are fulfilled, whether to retaliate in the same sector and under the same agreement that was originally violated by the respondent, or under the same agreement but in a different sector, or under a different agreement and sector (cross-retaliation).

III.C: Stages, principles and procedures governing countermeasures

III.C.2: Core requirements

First, **a quantitative requirement**, i.e. the level of suspension that can be authorized.

The level of suspension of concessions or other obligations authorized by the DSB must be "equivalent" to the level of nullification or impairment (Article 22.4 of the DSU). This has been interpreted to mean that the complainant's retaliatory response may not go beyond the level of the 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 reasonable period of time. This amount is generally calculated on an annual basis.

III.C: Stages, principles and procedures governing countermeasures

III.C.3: Permissible sectors and agreements

Key provision:
Article 22.3 (a), (b), (c), (f) and (g) of the DSU

Article 22.3(a) of the DSU — In the same sector and under the same agreement that was originally violated by the respondent, or…

The general principle is that the complainant should request the suspension of concessions or other obligations in the same sector(s) in which a violation has been found. For example, if the violation occurred in the area of distribution services, then the countermeasure should also be in this area. On the other hand, a WTO-inconsistent tariff on automobiles (a good) can be countered with a tariff surcharge on cheese, furniture or pyjamas (also goods) (see an example case here).

Article 22.3(b) of the DSU — …under the same agreement but in a different sector, or…

However, if the complainant considers it "impracticable or ineffective" to remain within the same sector, the countermeasures can be imposed in a different sector under the same agreement (Article 22.3(b) of the DSU). So, for instance, a violation in the area of distribution services could be countered in the area of health services. Practicability and effectiveness have been measured also in terms of the countermeasure's contribution to the objective of inducing compliance. (Decision by the Arbitrators, EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 76.).

Article 22.3(c) of the DSU — …under a different agreement and sector (cross-retaliation).

If the complainant considers it impracticable or ineffective to remain within the same agreement, and the circumstances are serious enough, the countermeasures can be taken under another agreement. Past arbitrators have interpreted these requirements in terms of the difficulty for the complaining party to find a way of ensuring the effectiveness of a suspension of concessions or other obligations (See e.g. Decision by the Arbitrator, US – Gambling *(Article 22.6 – US)*, para. 4.115;).

Cross-retaliation and developing countries

Cross-retaliation and developing countries

“Particularly for smaller and developing country Members, the possibility of suspending obligations under a different sector or different agreement can be quite important.

First, smaller and developing countries do not always import goods and services or intellectual property rights (in sufficient quantities) in the same sectors as those in which the violation or other nullification or impairment took place. This may make it impossible to suspend obligations at a level equivalent to that of the nullification or impairment committed by the respondent, unless the complainant can suspend obligations in a different sector or under a different agreement.

Second, the suspension in the same sector or under the same agreement could be ineffective or impracticable because the bilateral trade relationship is asymmetrical in that it is relatively important for the complainant and relatively unimportant for the respondent, particularly if the latter is a big trading nation. In that case, the effects of the suspension of obligations and the imposition of trade barriers might not even be visible in the respondent's trade statistics.

Third, it might be economically unaffordable for the developing country complainant to impose trade barriers against imports following the suspension of obligations under GATT 1994 or GATS because this would reduce the supply and/or increase the price of these imports on which the complainant's producers and consumers might depend.

For these reasons, it is important for developing countries to be able to use methods of suspending obligations that do not result in trade barriers.”

BACK TO COURSE

III.D: Arbitration on the level of suspension

III.D.1: Initiation of proceedings

Key provision:
Article 22.6-7 of the DSU

If the respondent disagrees with the complainant's proposed suspension, which is typically the case, the respondent may request arbitration (*). **Such disagreement can relate either to**:

✓**whether the level of retaliation is equivalent to the level of nullification or impairment**; or

✓**whether the principles governing the form of permitted suspension (i.e. the qualitative requirements) are respected**.

(*) The request for arbitration under Article 22.6 of the DSU is subject to the same "specificity standards" as a request for the establishment of a panel under Article 6.2 of the DSU. Decision by the Arbitrators, EC — Bananas III (Ecuador) (Article 22.6 — EC), para. 20.

Article 22.6 arbitrations have some procedural specificities; TO KNOW MORE, click here!

TO KNOW MORE: Procedural specificities of Article 22.6 Arbitration proceedings

Article 22.6 arbitrations have some procedural specificities, when compared to other proceedings under the DSU.

First, these arbitrations are requested by the respondent who objects to the complainant's request to the DSB for an authorization to suspend concessions or other obligations.

Second, arbitrators have developed the practice of asking the complaining party to file, at the start of the proceedings, a methodology paper. In that written communication, the complainant explains the proposed suspension it requested from the DSB under Article 22.2 of the DSU.

In addition, Article 22.6 arbitrations, as with Article 21.5 compliance panel proceedings, follow a system of double-briefing before the hearing, i.e. both rounds of written communications take place prior to the oral hearing. There is also one single oral hearing.

BACK TO COURSE

III.D: Arbitration on the level of suspension

III.D.2: Appointment and duration of proceedings

If the original panelists are available, they will act as the arbitrator; otherwise the WTO Director-General appoints an arbitrator. Article 22.6 of the DSU also foresees that the arbitration will be completed 60 days after the date of expiry of the reasonable period of time. In practice, **arbitrations pursuant to Article 22.6 of the DSU tend to start long after the expiry of the reasonable period of time**, after the completion of compliance proceedings under Article 21.5 of the DSU.

III.D: Arbitration on the level of suspension

III.D.3: Mandate of arbitrators

The arbitrator's mandate is to determine whether the level of the proposed suspension of concessions is equivalent to the level of nullification or impairment and, where this is challenged, **whether the rules and procedures concerning the permissible sector of retaliation (under Article 22.3 of the DSU), have been followed**. In order to assess whether the level of proposed suspension is consistent with the requirements of the DSU, the arbitrator will generally determine whether it correctly reflects the approximate value of the trade lost due to the measure found to be WTO-inconsistent or otherwise to nullify or impair benefits. If not, the arbitrator may need to calculate what would constitute a level of suspension equivalent to the level of nullification or impairment. How this is calculated may vary from case to case. **However, 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 country.**

III.D: Arbitration on the level of suspension

III.D.4: The arbitration award

Key provision:
Article 22.7 of the DSU

Unlike panel and Appellate Body rulings, the decision of the arbitrator need not to be adopted by the DSB. Indeed, **the parties must accept the decision of the arbitrator as final and not seek a second arbitration**, and the DSB is simply informed promptly of the outcome of the arbitration. **Once the decision is issued, the complainant *may* request the DSB to grant authorization to suspend concessions or other obligations, but is under no formal obligation to do so**. **The DSB will take its decision by negative or reverse consensus.**

TIP!
Having obtained authorization from the DSB to suspend concessions or other obligations does not mean that the complainant is obliged to actually do so! Indeed, a complainant may choose not to proceed with the suspension but rather to use the authorization as a bargaining tool with the respondent.

III.D: Arbitration on the level of suspension

III.D.5: Special rules under the SCM Agreement

Key provisions:
Articles 4.10-11 and 7.9-10 of the SCM Agreement

In the case of prohibited subsidies, if the respondent has not followed the DSB's recommendation within the time-period specified by the panel for the withdrawal of the subsidy, the DSB grants authorization to the complaining Member to take "appropriate countermeasures", unless there is a negative consensus against it (Article 4.10 of the SCM Agreement). In that context, the arbitrator under Article 22.6 of the DSU is mandated to determine whether the proposed countermeasures are appropriate (Article 4.11 of the SCM Agreement). In practice, the standard of "*appropriateness*" has been found to permit countermeasures that may be higher rather than strictly "equivalent" to the level of nullification or impairment caused by the prohibited subsidy.

In respect of actionable subsidies, if the respondent has not followed the DSB's recommendation to withdraw the subsidy or remove its adverse effects within six months from the adoption of the report(s), the complaining party is entitled to request authorization to impose "countermeasures commensurate with the degree and nature of the adverse effects determined to exist“ (Article 7.9 of the SCM Agreement). In the event that the responding party disagrees on the requested countermeasures, it may request arbitration pursuant to Article 22.6 of the DSU.

III.E: Takeaway messages from Lesson 3

Lesson 3 has discussed the following key points:

- There are two types of *temporary remedies* for non-compliance with recommendations and rulings of the DSB: seeking compensation, which must be WTO-consistent and mutually agreed between the parties; or, where compensation cannot be agreed upon, requesting from the DSB authorization to suspend concessions or other WTO obligations. The purpose of both these remedies is inducing compliance with the original recommendations and rulings of the DSB.
- Most observers agree that suspending obligations in response to the failure of timely implementation does not make good economic sense.
- When a complaining Member is considering whether to impose countermeasures, it has to abide by a quantitative, and a qualitative, requirement: the former means that the level of suspension of concessions or other obligations authorized by the DSB must be "equivalent" to the level of nullification or impairment; the latter means that, provided certain conditions are fulfilled, the Member concerned can decide in which sector and under which agreement to suspend concessions or other obligations.
- If there is disagreement on the level of suspension, or on whether the applicable DSU disciplines have been followed by the retaliating Member, the matter can be referred to arbitration. The arbitrator's mandate is to determine whether the level of the proposed suspension of concessions is equivalent to the level of nullification or impairment and, where this is challenged, whether the rules and procedures concerning the permissible sector of retaliation have been followed. The parties must then accept the decision of the arbitrator as final and not seek a second arbitration.
- Where the infringing measure is found to be either a prohibited or an actionable subsidy, within the meaning of the SCM Agreement, special rules will apply.

III.F: Suggested readings and resources

References for Lesson 3:

- Dispute Settlement System training module: chapter 6:
  http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s7p2_e.htm
- WTO Analytical Index: interpretation of the DSU:
  http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_e.htm

Further readings and resources:

- "Re-assessing WTO remedies: the prospective and the retrospective", by Vidigal, Geraldo, in Journal of International Economic Law, 16(3), 505–534, (July 2013)
- "Trade Law and Development, special issue: Dispute Settlement at the WTO":
  http://www.tradelawdevelopment.com/index.php/tld/issue/view/4%281%29%20TL%26D%20%282012%29

WTO/OMC
E-LEARNING

Module 5:

Developing Countries in the WTO Dispute Settlement System

Start…

Welcome & Objectives

Welcome to Module 5 on developing countries in the WTO Dispute Settlement System (DSS). By studying this module and taking the exam, **you will be able to, for instance**:

Make a presentation about the way developing countries can use and have used the DSS;

Find and understand key documents related to developing countries in the DSS; and

Set the starting point to advise your administration in relation to the DSS and the role played therein by developing countries.

Structure

This module is divided into **three lessons**:

Lesson 1

How and how much are developing countries using the DSS?

Lesson 2

Do developing countries enjoy special and differential treatment under the rules governing the DSS?

Lesson 3

What are the available mechanisms for technical assistance and capacity building?

LESSON 1

How and how much are developing countries using the DSS?

Introduction

General remarks about developing countries in the DSS

Over the first 17 years of existence of the WTO DSS, and in spite of the practical burdens they face, many developing-country Members have been **active participants** in the system. Developing-country Members are, however, an heterogeneous group of WTO Members, and the study of their participation in the DSS, in both qualitative and quantitative terms, needs to take into account various elements. Lesson I presents some of those elements, accompanied by facts and figures.

TO KNOW MORE:
Who are the "developing-country Members" of the WTO? How are they classified as such? TO KNOW MORE, click here and here.

Introduction

What about LDCs?

Key provision:
Article 24 of the DSU

Least-developed country (LDC) Members of the WTO enjoy a special status under the Dispute Settlement Understanding (DSU) and other rules governing the DSS (see Lesson II). As of 31 December 2012, **LDC Members have been directly involved in proceedings (i.e., as complainants or respondents) in only one case**, which was solved through a mutually agreed solution notified to the Dispute Settlement Body (DSB) before the establishment of a panel.

EXAMPLE : LDCs in the DSS

As of 31 December 2012, one LDC has initiated a dispute settlement proceeding (WT/DS306 – *India Anti-Dumping Measure on Batteries from Bangladesh*).

On the basis of the UN list of LDCs and WTO data of disputes by country, the participation of LDC Members in WTO dispute settlements is summarized as follows:

- ✓ Bangladesh, as complainant (DS306), as third party (DS243)
- ✓ Benin, as third party (DS267)
- ✓ Chad, as third party (DS267)
- ✓ Haiti, as third party (DS27)
- ✓ Madagascar, as third party (DS27, DS265, DS266, DS283)
- ✓ Malawi, as third party (DS265, DS266, DS283, DS434)
- ✓ Senegal, as third party, (DS27, DS58)
- ✓ Tanzania, as third party (DS265,DS266,DS283)
- ✓ Zambia, as third party (DS434)

Accordingly, nine LDCs have participated in panel proceedings as a third party. As DS243 was not appealed, six LDCs have participated in Appellate Body proceedings as third participants.

Source: WT/COMTD/W/196, p. 79.

BACK TO COURSE

I.A: An open debate

I.A.1: Introduction

It is generally agreed that the very existence of a compulsory (*) multilateral dispute settlement system provides in itself a benefit for developing countries and small economies. This system enables all Members to resolve trade disputes in a fair, predictable and rapid manner. However, some commentators challenge these views as being too theoretical; they rather contend that developing countries face structural challenges that inherently prevent them from making effective use of the system.

(*) There is no need for the parties to a dispute to accept the jurisdiction of WTO tribunals in a separate declaration or agreement. This type of court jurisdiction is commonly referred to as “compulsory”.

What are the main arguments supporting these two somehow conflicting views? Try to guess the answer before opening the next page!

I.A: An open debate

I.A.2: Main arguments and counter-arguments

Developing countries can use and have used the DSS effectively	Developing countries face structural challenges to their effective participation in the DSS
▪ The rules-based DSS grants equal access to all Members, and its decisions are made on the basis of rules rather than on the basis of economic power… ▪ The DSS has empowered developing countries and small economies by placing countries with asymmetric economic power on equal legal grounds… ▪ Law enforcement systems may benefit small economies more than larger ones because the larger ones have other means to defend and impose their interests in the absence of these systems… ▪ Most developing country Members have prevailed over developed country Members in those disputes they have initiated…	▪ …but developing countries often do not have the legal capacity required for the highly specialized substantive and procedural provisions of the WTO… ▪ …but for small economies with a limited number of government officials, it may not be efficient to train experts in WTO procedural law if they do not participate often in WTO litigation, and retaining external counsel entails financial burdens… ▪ …but the human and financial burdens, the absence of damages and the difficulty for small economies of enduring the economic harm arising from the other Member's trade barrier for the duration of the dispute are factors to be considered...

Test your knowledge!

True or false?

TRUE

FALSE

The rules-based DSS grants equal access to all WTO Members.

Developing countries are active participants in the DSS.

The economic harm suffered as a consequence of violations may weigh more heavily on weaker Members.

Test your knowledge!

Answer:

TRUE	FALSE

The rules-based DSS grants equal access to all WTO Members.

Developing countries are active participants in the DSS.

The economic harm suffered as a consequence of violations may weigh more heavily on weaker Members.

I.B: Facts & Figures

I.B.1: General considerations

Key documents:
Annual Reports by the Chairperson of the DSB (here)

In the last few years, however, the participation of developing country Members has increased.

TIP!
The participation as "third party" offers important advantages, especially to developing country Members, who can gain valuable experience in the dispute settlement proceedings without getting directly involved as a party.

I.B: Facts & Figures

I.B.2: Correlations

The number of disputes initiated and defended appears to be strongly correlated to the volume and diversification of imports and exports of the Member under analysis – hence smaller trade volumes may naturally correspond to a lower rate of participation in the DSS.

Top ten DSS users (*):	US	EU	CAN	IND	CHI	ARG	BRA	MEX	JAP	KOR
Top ten importers (**):	EU	US	CHI	JAP	HK	KOR	IND	CAN	SIN	MEX
Top ten exporters (**):	EU	CHI	US	JAP	KOR	RUS	HK	CAN	SIN	MEX

A clear need for ad hoc rules and technical assistance

(*) Complainants + respondents aggregated, 2012; (**) Trade in goods only, all HS headings, 2012.

I.B: Facts & Figures

I.B.3: Concluding remarks

A clear need for *ad hoc* rules and technical assistance

"The moderate trade volume affected by a possibly WTO-incompatible trade barrier maintained by another Member might not always justify the considerable investment of time and money necessary for a WTO dispute. There is thus no question that developing country Members are in a special situation which, to some extent, the current dispute settlement system also addresses.

There is also no question that the ability of developing country Members to make effective use of the dispute settlement system is essential for them to be able to reap the full benefits they are entitled to under the WTO Agreement.

The tools to address the particular situation of developing country Members are the rules on special and differential treatment and legal assistance, as discussed in Lessons 2 and 3 of this module."

I.C: Takeaway messages from Lesson 1

Lesson 1 has discussed the following key points:

- Since the beginning of the WTO DSS, and in spite of the practical burdens they face, many developing-country Members have been active participants in the system.
- LDC Members have been directly involved in proceedings (i.e., as complainants or respondents) in only one case, which was solved through a mutually agreed solution; on the other hand, they have been involved as third parties more frequently.
- It is generally agreed that the very existence of a compulsory multilateral dispute settlement system provides in itself a benefit for developing countries and small economies. This system enables all Members to resolve trade disputes in a fair, predictable and rapid manner. However, some commentators challenge these views as being too theoretical.
- Improving the ability of developing country Members to make effective use of the dispute settlement system is essential for them to be able to reap the full benefits they are entitled to under the WTO Agreement.

I.D: Suggested readings and resources

References for Lesson 1:

- Dispute Settlement System training module: chapter 11: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm
- Special and differential treatment provisions in WTO agreements and decisions, WTO Document WT/COMTD/W/196 of 14 June 2013
- Annual Reports by the Chairperson of the DSB: http://www.wto.org/english/tratop_e/dispu_e/speech_agah_4mar10_e.htm
- Audio of 2011 WTO Public Forum Session "Dispelling the Myths of Developing Country Participation in Dispute Settlement Mechanism": http://www.wto.org/english/forums_e/public_forum11_e/programme_e.htm

Further readings and resources:

- "Dispute Settlement at the WTO: The Developing Country Experience", Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz, Cambridge University Press, 2010.
- "LDCs in the WTO Dispute Settlement System", by Sharmin J. Tania, Netherland International Law Review, Volume 60/03, December 2013, pp. 375-409.
- "Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement", by Jan Bohanes & Fernanda Garza, Trade, Law and Development, Summer 2012, Vol.IV, No. 1, available at: http://www.tradelawdevelopment.com/index.php/tld/issue/view/4%281%29%20TL%26D%20%282012%29
- 'Developing Country Success in WTO Disputes', by Kristina M.W. Mitchell, Journal of World Trade 47,no.1 (2013):77–104.

LESSON 2

Do developing countries enjoy special and differential treatment under the rules governing the DSS?

Introduction

Certain rules governing the DSS foresee "special & differential treatment" (S&D) provisions that apply to dispute settlement proceedings involving a developing-country Member. These rules apply, in particular:

- **At the consultation stage;**
- **At the panel stage;**
- **At the implementation stage; and**
- **Through the establishment of accelerated procedures.**

In addition, there are S&D rules that apply to the specific case of least-developed country Members.

II.A: What is S&D?

Key document:
WT/COMTD/W/196

S&D provisions can be found in almost all the WTO agreements. They are a typology of rules that includes, for instance, provisions aimed at increasing trade opportunities, or at safeguarding the interests of developing country Members and LDCs.

It is important to bear in mind that, in most cases, these provisions do not act as exceptions to other rules, but rather constitute independent legal rules. On the other hand, they may or may not create legal obligations, depending on the way they are formulated, the context in which they are formulated, and the purpose of their inclusion in a legal text.

TO KNOW MORE about S&D, click here.

II.B: S&D in the DSU

The table below enumerates the S&D provisions that can be found in the DSU:

Typology of provision	Quantity	Specification of DSU Articles
Provisions that require WTO Members to safeguard the interests of developing country Members	7	Article 4.10, Article 8.10, Article 12.10, Article 12.11, Article 21.2, Article 21.7, and Article 21.8
Flexibility of commitments, of action, and use of policy instruments	1	Article 3.12
Technical assistance	1	Article 27.2
Provisions relating to measures to assist LDC Members	2	Article 24.1 and Article 24.2
Total	**11**	

Importantly, most of these provisions are addressed to WTO bodies (e.g. the DSB).

II.C: S&D at the consultation stage

Key provisions:
Articles 4.10 and 12.10 of the DSU

S&D norms at the consultations stage can have effects on the duration of consultations. The general rules on duration of consultations can be found in Article 4.7 of the DSU. **There are two S&D provisions that are applicable to the consultation stage**, as explained in the table below:

Article 4.10 of the DSU	During consultations, Members "should give special attention to the particular problems and interests of developing country Members". This provision does not appear to create a legal obligation.
Article 12.10 of the DSU	According to the general rule governing timeframes for consultations, the complainant *may* unilaterally request the establishment of a panel *at least* 60 days after the date in which the request for consultations has been received … however, Article 12.10, first and second sentences, states that where the respondent is a developing country and the parties disagree on the outcome of the consultations, the DSB Chairperson can extend the time-period for consultations. [This mechanism has never been invoked].

TIP!
It should be noted that the DSU sets forth only the *minimum duration* for consultations; it has become common that, where both parties so agree, consultations last for longer than 60 days.

II.D: S&D at the panel stage

Key provisions:
Articles 8.10, 12.10 and 12.11 of the DSU

S&D provisions at the panel stage have effects on panel composition, time periods and formulation of findings in panel reports. **There are three S&D provisions that are applicable to the panel stage**, as explained in the table below:

Article 8.10 of the DSU	When panels are composed, developing country Members can request that at least one member of the panel be a national of a developing country.
Article 12.10, third sentence, of the DSU	Where the respondent is a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. This, in any case, would not affect the standard duration of panel proceedings, including proceedings under Article 21.3(c) of the DSU.
Article 12.11 of the DSU	Panels must explain, in their reports, *how* specific S&D rules raised by developing countries parties to the dispute have actually informed their analysis. The rationale for this rule is to achieve transparency as to how S&D rules have been applied.

II.E: S&D at the implementation stage

Key provisions:
Articles 21.2, 21.3(c), 21.7 and 21.8 of the DSU

S&D at the implementation stage can have several effects, as the table below explains:

Article 21.2 of the DSU	The general principle foresees that "particular attention should be paid to matters affecting the interests of developing country Members" where they have challenged or defended measures through the DSS.
Article 21.3(c) of the DSU	Arbitrators' decisions on the reasonable period of time (RPT) for implementation have frequently taken into account the "particular circumstances" affecting the implementation of recommendations and rulings in developing country Members.
Article 21.8 of the DSU	Where the complainant is a developing country, the DSB must take into account the broader economic impacts that the infringing measure has on the economy of the complainant. This provision has been taken into account in arbitration proceedings related to retaliation (see e.g. *EC – Bananas III* (Article 22.6), para. 136).

TIP!

In *Indonesia — Autos* (Article 21.3(c)), for instance, the Arbitrator, in granting a longer RPT, took into account not only Indonesia's status as a developing country, but also the fact that Indonesia was "a developing country … in a dire economic and financial situation".

II.F: S&D through accelerated procedures

Key provision:
Article 3.12 of the DSU, citing, incorporating "the Decision of 1966" (here)

Pursuant to Article 3.12 of the DSU, the "accelerated procedures" of the Decision of 5 April 1966 are available, if requested, to developing country Members. Accordingly, **the table below lists the circumstances in which such accelerated procedures may apply, and compares them with the relevant standard procedures**:

Standard procedures	Accelerated procedures as per the Decision of 1966
Article 4 of the DSU – Consultations	Consultations conducted personally by the WTO Director-General (DG) on behalf of developing countries; upon request of one of the parties, the DG prepares a report on the consultations.
Article 5 of the DSU – Good offices, Conciliation and Mediation	
Article 6 of the DSU – Establishment of Panels	The DSB establishes a panel with the agreement of the parties if DG's consultations fail to settle the dispute.
Article 12 of the DSU – Panel procedures	Panels have 60 days to render their decision; an extension can be granted with the complainant's agreement.

One famous case was solved through the procedures of the Decision of 1966. TO KNOW MORE, click here.

II.G: S&D for least-developed country Members

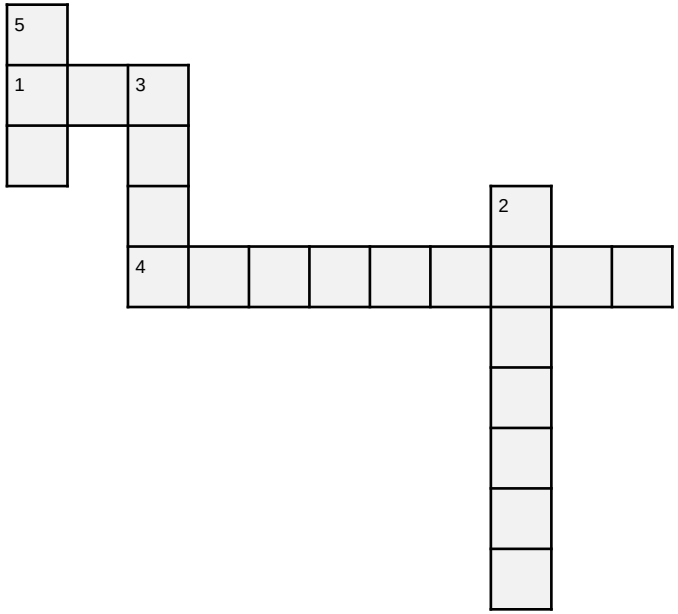
Key provision:
Article 24 of the DSU

The special and differential treatment provisions apply to least-developed country Members, which are part of the group of developing country Members. In addition, the DSU sets forth a number of additional rules applicable only to least-developed country Members:

Article 24.1 of the DSU	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 matters 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.
Article 24.2 of the DSU	For disputes involving a least-developed country Member, the DSU also foresees the use of good offices, conciliation and mediation. Where consultations have not resulted in a satisfactory solution, upon request by a least-developed country Member, the Director-General or the Chairman of the DSB will offer their good offices, conciliation and mediation, with the view to assisting the parties to settle the dispute before the establishment of a panel.

Test your knowledge!

Can you find the words?

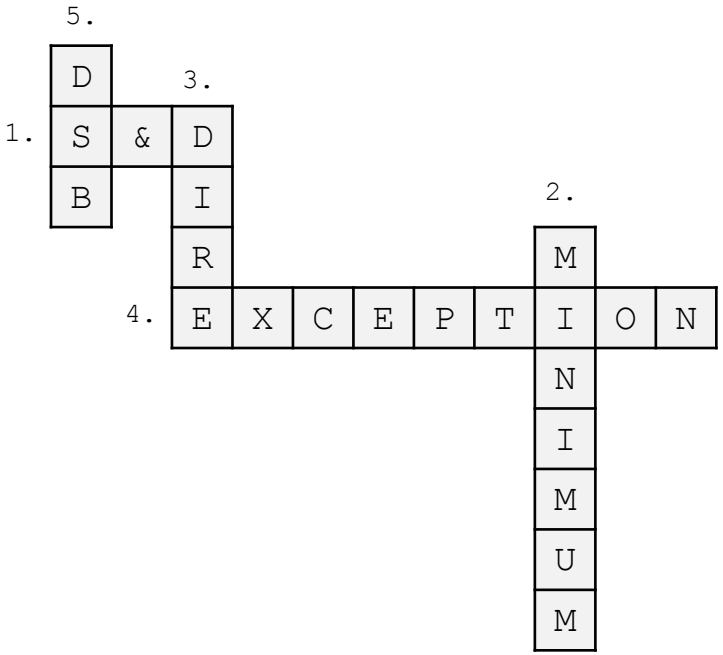


Definition

1. Special and Differential Treatment (…&…)
2. Type of “duration” under Article 4.7 of the DSU
3. The economic and financial situation of Indonesia according to the Arbitrator in Indonesia – Autos (21.3(c))
4. What S&D provisions normally do not create (singular)
5. Must take into account the broader economic impacts that the infringing measure has on the economy of the complainant where the latter is a developing country (acronym)

Test your knowledge!

Answer:



Definition

1. Special and Differential Treatment (S&D)
2. Type of “duration” under Article 4.7 of the DSU
3. The economic and financial situation of Indonesia according to the Arbitrator in Indonesia – Autos (21.3(c))
4. What S&D provisions normally do not create (singular)
5. Must take into account the broader economic impacts that the infringing measure has on the economy of the complainant where the latter is a developing country (acronym)

II.H: Takeaway messages from Lesson 2

Lesson 2 has discussed the following key points:

- S&D rules, or provisions, exist in the DSU and apply at the consultation, panel, and implementation stages: S&D norms at the consultation stage can have effects, for instance, on the duration of consultations; S&D provisions at the panel stage have effects on panel composition, time periods and formulation of findings in panel reports; S&D at the implementation stage can have several effects, including on the calculation of the length of the RPT for implementation. Moreover, the “accelerated procedures” of the Decision of 5 April 1966 are available, if requested, to developing country Members.
- The special and differential treatment provisions apply to least-developed country Members, which are part of the group of developing country Members. In addition, the DSU sets forth a number of additional rules applicable only to least-developed country Members.
- WTO tribunals do take into account S&D norms in various instances, including arbitration proceedings under Article 21.3(c) of the DSU and standard panel proceedings.

II.I: Suggested readings and resources

References for Lesson 2:

- Dispute Settlement System training module: chapter 11: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm
- Special and differential treatment provisions in WTO agreements and decisions, WTO Document WT/COMTD/W/196 of 14 June 2013
- Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c))*

Suggested readings and resources:

- Considering development in the implementation of panel and Appellate Body reports, by Sonia E. Rolland, Trade, Law and Development, Summer 2012, Vol. IV, No. 1, available at: http://www.tradelawdevelopment.com/index.php/tld/issue/view/4%281%29%20TL%26D%20%282012%29

LESSON 3

What are the available mechanisms for technical assistance and capacity building?

Introduction

There are various capacity building and technical assistance programmes aimed at improving the ability of developing-country Members to use the DSS to advance their trade policy objectives, or to defend their trade-related measures. These include:

- **The assistance provided by the WTO Secretariat, through legal advice and training courses;** and
- **The work of the Advisory Centre on WTO Law (ACWL), through legal advice, legal representation at affordable prices, and training activities.**

III.A: Assistance provided by the WTO Secretariat

III.A.1: Legal advice

Key provision:
Article 27 of the DSU

1: legal basis

Article 27.2 of the DSU places an obligation on the WTO Secretariat to make available to developing countries who request this service a qualified legal expert. To this effect, the Institute for Training and Technical Cooperation (ITTC), a division in the WTO Secretariat, employs two independent consultants on a permanent part-time basis.

III.A: Assistance provided by the WTO Secretariat

III.A.1: Legal advice

2: tasks

Importantly, consultants and Secretariat experts acting under the mandate of Article 27.2 of the DSU have to ensure, in the exercise of their functions, the continued impartiality of the Secretariat. This explains why **their main task is to provide analyses on the viability of claims of breach, on the one hand, and on the strengths or weaknesses of potential defences, on the other (commonly referred to as "legal opinions")**. In simpler words, legal opinions provide assessments of measures on the basis of their WTO-compatibility.

III.A: Assistance provided by the WTO Secretariat

III.A.1: Legal advice

3: how to access

If a developing country or LDC Member needs this type of assistance, it has to **send a letter to the Director of the WTO's ITTC** containing the request. The requesting Member has to specify the nature of the assistance sought, bearing in mind that **this type of assistance is limited to the analysis of measures that could give rise to a dispute, or to the preparation of third party submissions**.

III.A: Assistance provided by the WTO Secretariat

III.A.2: Training courses

Article 27.3 of the DSU states that **"[t]he [WTO] Secretariat shall conduct special training courses for interested Members concerning … dispute settlement procedures and practices** so as to enable Members' experts to be better informed in this regard."

Pursuant to this mandate, that adds to the broader mandate for technical assistance contained in the Doha Ministerial Declaration, **the WTO Secretariat currently provides specialized courses on the DSS**. These courses are aimed at transferring knowledge and skills to developing country and LDC representatives. The present E-Learning course falls within this category of training activities.

TO KNOW MORE about training & technical assistance provided by the WTO Secretariat, click here.

Test your knowledge!

Match the following statements:

The main task of the consultants acting under Article 27.2 of the DSU has been to …

Consultants and Secretariat experts acting under the mandate of Article 27.2 of the DSU have to …

5% of requests …

…ensure, in the exercise of their functions, the continued impartiality of the Secretariat.

…came from LDC Members.

…prepare legal opinions and inputs in third party submissions.

Test your knowledge!

Answer:

The main task of the consultants acting under Article 27.2 of the DSU has been to …

Consultants and Secretariat experts acting under the mandate of Article 27.2 of the DSU have to …

5% of requests …

…ensure, in the exercise of their functions, the continued impartiality of the Secretariat.

…came from LDC Members.

…prepare legal opinions and inputs in third party submissions.

III.B: Private representation in WTO proceedings

Differing from the pre-WTO practice, **nothing in WTO law prevents WTO Members from being represented by private legal counsel** in dispute settlement proceedings (*). It is now common practice for private legal counsel to appear in panel and Appellate Body proceedings as part of a Member's delegation.

The possibility to have recourse to private counsel can be a clear asset for developing countries lacking human resources to be devoted to WTO dispute settlement proceedings. However, the price charged by specialized service providers can be unaffordable for many of them. Hence the establishment, in 2001, of the Advisory Centre on WTO Law (ACWL).

(*) Appellate Body Report, *EC – Bananas III*, para. 10.

III.C: The Advisory Centre on WTO Law

III.C.1: Establishment and mandate

Key text:
Agreement Establishing the ACWL

Legal status	The ACWL is a "legal aid" centre in the form of an independent intergovernmental organization. **It is separate and independent from the WTO**. The staff of the ACWL comprises independent legal experts.
Establishment	The ACWL was established by an international agreement signed by 29 Members of the WTO in Seattle on 1 December 1999, the "Agreement Establishing the Advisory Centre on WTO Law". This Agreement entered into force on 15 June 2001 and **the ACWL became operational on 5 October 2001**.
Membership	**LDC Members and Observers of the WTO are entitled to the services of the ACWL with no membership obligation.**
Accession	Every WTO Member, whether a developing country or not, as well as countries and independent customs territories in the process of accession to the WTO, can become members of the ACWL.

III.C: The Advisory Centre on WTO Law

III.C.2: Functions

1: legal assistance

The ACWL provides legal assistance in WTO dispute settlement proceedings. This means representing WTO Members throughout dispute settlement proceedings (e.g. by drafting documents addressed to the DSB, submissions to panels and the Appellate Body and by appearing on behalf of those Members before panels and the Appellate Body).

For these services, the "clients" pay (discounted) rates at varying levels that depend on the level of economic development and on whether they are members of the ACWL.

III.C: The Advisory Centre on WTO Law

III.C.2: Functions

2: legal advice

Similar to the services provided by the WTO Secretariat under Article 27.2 of the DSU, **the ACWL prepares legal opinions on matters that are not yet the subject of a dispute. These services are free of charge for LDCs and for members of the ACWL that are developing countries or countries with economies in transition, up to a certain amount of hours**. The ACWL also provides legal assistance, at a commercial rate, to developing countries that are not its members.

III.C: The Advisory Centre on WTO Law

III.C.2: Functions

3: training

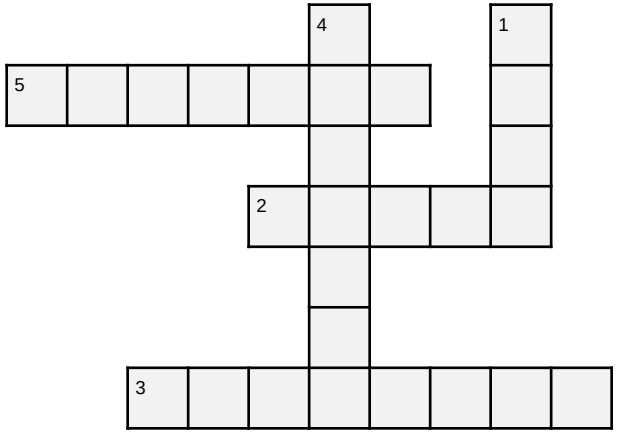
The ACWL provides training on WTO law and offers paid internships in order to enhance the expertise of developing country officials.

Test your knowledge!

Can you find the words?

Definition

1. The “Advisory Centre on WTO Law”
2. The ACWL provides this type of opinions
3. Legal opinions provide an assessment of their WTO compatibility
4. The ACWL hosts them to enhance their expertise
5. It prevents WTO Members from being represented by private legal counsel



Test your knowledge!

Can you find the words?

Definition

1. The “Advisory Centre on WTO Law”
2. The ACWL provides this type of opinions
3. Legal opinions provide an assessment of their WTO compatibility
4. The ACWL hosts them to enhance their expertise
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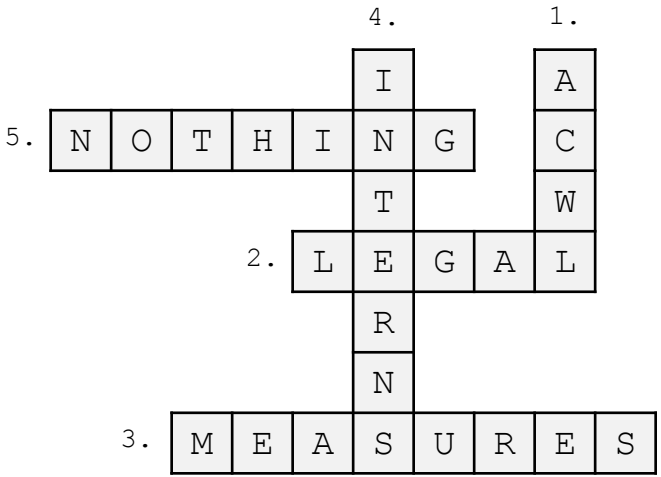


III.D: Takeaway messages from Lesson 3

Lesson 3 has discussed the following key points:

- The WTO Secretariat, under Article 27 of the DSU, provides legal assistance to all WTO Members. Article 27.2 of the DSU places an obligation on the WTO Secretariat to make available a qualified legal expert to developing countries who request this service.
- If a developing country or LDC Member needs the assistance of the WTO Secretariat under Article 27.2, it has to send a letter to the Director of the Institute for Training and Technical Cooperation (ITTC) of the WTO containing the request.
- The ACWL is a "legal aid" centre in the form of an independent intergovernmental organization. It is separate and independent from the WTO.
- Both the WTO Secretariat and the ACWL provide “legal opinions”. In addition, the ACWL provides legal representation for developing countries and LDCs for discounted rates, depending on their level of economic development and on whether they are members of the ACWL.

III.E: Suggested readings and resources

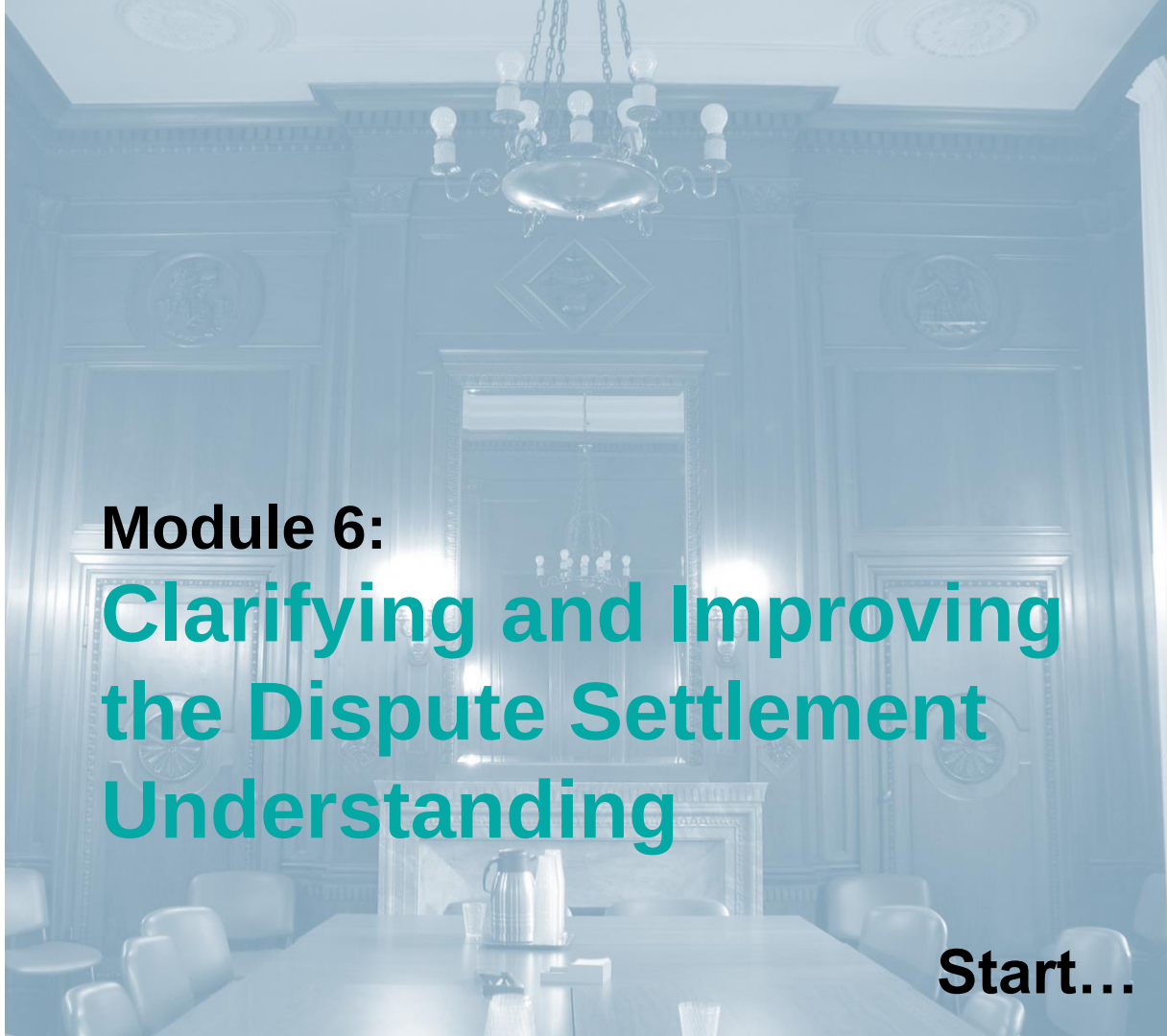
References for Lesson 3:

- Dispute Settlement System training module: chapter 11: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm
- Interviews with WTO Secretariat
- WTO technical assistance and training: http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm
- Appellate Body Report, *EC – Bananas III*
- The Agreement establishing the Advisory Centre on WTO Law: http://www.acwl.ch/e/documents/agreement_estab_e.pdf
- The ACWL Reports on Operations: http://www.acwl.ch/e/about/reports.html

Further readings and resources:

- "An evaluation of the role of legal aid in international dispute resolution, with emphasis on the Advisory Centre on WTO Law", by Petina Gappah, in *Agreeing and Implementing the Doha Round of the WTO*, Edited by Harald Hohmann, Cambridge University Press, 2008

WTO/OMC
E-LEARNING



Module 6:

Clarifying and Improving the Dispute Settlement Understanding

Start…

Welcome & Objectives

Welcome to module 6! This module discusses some of the proposals advanced by WTO Members to improve the WTO Dispute Settlement System (DSS). By studying this module and taking the exam, **you will be able to**:

Understand why a review of the DSS is being discussed, as well as the content of specific proposals; and

Find key negotiating documents and other useful information.

Structure

This module is divided into **three lessons**:

Lesson 1

Why are Members reviewing the WTO Dispute Settlement System?

Lesson 2

What are the proposals under consideration?

Lesson 3

What are the proposals on issues of particular interest for developing countries?

LESSON 1

Why review the WTO Dispute Settlement System?

Introduction

If the DSS and its main legal instrument, the Dispute Settlement Understanding (DSU), are considered by many as a major achievement and key function of the WTO, why are there review proposals?

WTO Members had established a clear mandate for reviewing the DSU well before the Doha Round Negotiations were launched in November 2001. With the Doha Round, this review process has become a fully-fledged negotiation, and **the proposals tabled by WTO Members, as discussed in Lessons II and III, have unveiled various possibilities to further improve the system, in particular by:**

- **Clarifying certain systemic issues, i.e. where existing rules are silent or ambiguous;**
- **Improving certain dispute settlement procedures, where Members felt that such procedures could be changed, or that new procedures could be added to the system; and**
- **Improving certain DSS institutions, where Members felt that there could be scope for improvement.**

I.A: Historical developments

1: Background

The table below shows some of the main developments that characterize the evolution of the DSS from the General Agreement on Tariffs and Trade (GATT 1947) era to the WTO.

GATT DSS →	WTO DSS
Panel reports adopted by consensus	Panel and Appellate Body reports adopted by "negative consensus"
No appellate review	Creation of an independent appeal mechanism, through the Appellate Body
No formal mechanisms for surveillance of implementation	Formal surveillance of implementation by the Dispute Settlement Body (DSB)

You can visit this page TO KNOW MORE about the GATT Dispute Settlement System.

I.A: Historical developments

2: From the GATT to the WTO

Key document:
Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes of 14 April 1994, here.

Since the new WTO DSS was substantially different from the system that operated under the GATT 1947, **WTO Members called for a full review of the DSU within four years after the entry into force of the WTO Agreement**, when they concluded the Uruguay Round. This review started in 1997, but did not lead to an agreed outcome.

I.A: Historical developments

3: The Doha and Hong Kong mandates

Key documents:
Doha Ministerial Declaration, WT/MIN(01)/DEC/1.

Extension of deadline, WT/GC/M/81, p. 18.

Paragraph 30 of the 2001 **Doha Ministerial Declaration mandates WTO Members to clarify and improve the DSU** on the basis of previous work to that effect, as well as any additional proposals by Members. Later, in 2005, the Hong Kong Ministerial Declaration reiterated this mandate.

From Doha and Hong Kong to the Chair Report of 2011

TIP!
Note that, pursuant to paragraph 47 of the Doha Ministerial Declaration, the negotiations on the review of the DSU are not part of the "**single undertaking**". This can be explained by the fact that DSU negotiations would bring systemic benefits for the whole membership, hence deserving to be carved out of the broader bargaining process of the Doha Round.

I.A: Historical developments

Key document:
Report of the Chair of the DSB-SS, TN/DS/25.

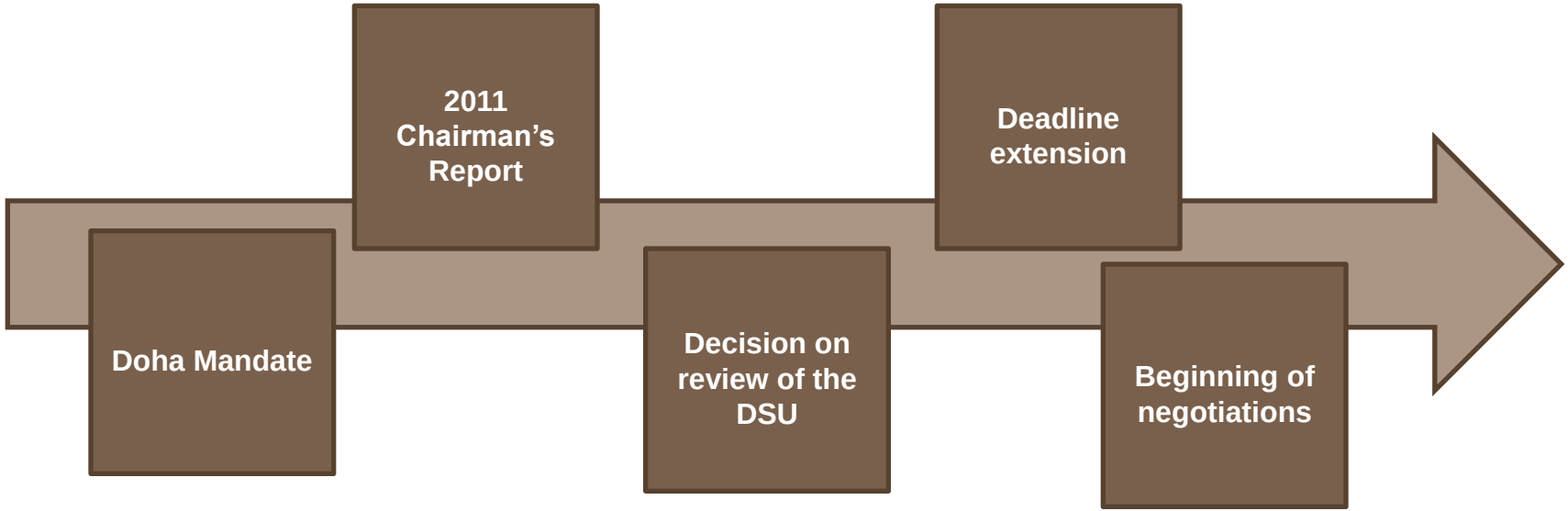
4: From Doha and Hong Kong to the Chair Report of 2011

"In April 2011, the Chair of the Dispute Settlement Body in Special Session stated that the negotiations had reached a point of maturity on a number of issues. Some key points can be drawn from a reading of the Chair's report:

- *Subjects on which there is significant support for change include the enhancement of third party rights or clarifying the order in which two phases of the implementation and enforcement procedure should occur when a Member believes that another has failed to comply with a final ruling ("sequencing").*
- *Other proposals seek to introduce new stages in the proceedings, such as the possibility of referring the case back to the original panel, where a factual issue arises at the appellate stage which had not been examined by the panel ("remand").*
- *Several proposals contain suggestions for enhancing the special and differential treatment of developing and least-developed countries.*
- *Lessons 2 and 3 will discuss these and other important issues!"*

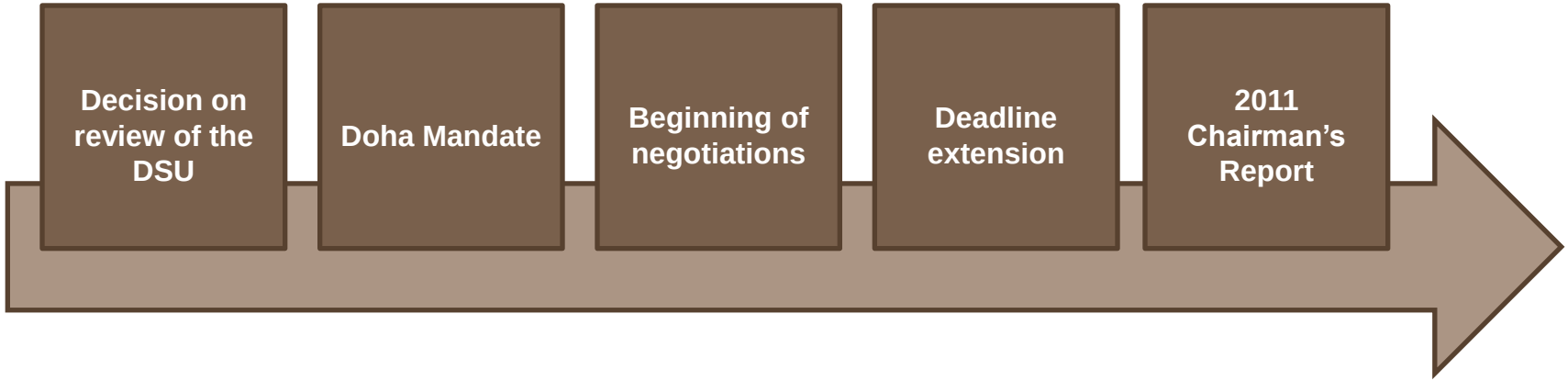
Test your knowledge!

Shift the boxes and adjust the following sequence of events without looking at your notes:



Test your knowledge!

Answer:



I.B: Takeaway messages from Lesson 1

Lesson 1 has discussed the following key points:

- A review of the DSS and of its main legal instrument, the DSU, is motivated by a desire of WTO Members to clarify certain issues and improve certain procedures.
- The WTO DSS has introduced a number of new features and is substantially different from its predecessor, the GATT DSS. As a consequence, a review of the DSU was already established at the end of the Uruguay Round. This evolved into a fully-fledged multilateral negotiation, launched with the Doha Round; however, due to the special nature and systemic importance of the DSU, this negotiation has been carved out from the Doha Round principle of the single undertaking, which bundles the destiny of the various other subjects under negotiation and expands bargaining dynamics.
- Various subjects are being considered by WTO negotiators, including “sequencing”, remand procedures and additional transparency, as well as special and differential treatment for developing countries. The meaning of these terms will be clarified in Lessons II and III.

I.C: Suggested readings and resources

References for Lesson 1:

- Negotiations on the Dispute Settlement Understanding: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations
- Report by the Chairman, Ambassador Ronald Saborío Soto to the Trade Negotiations Committee, WTO Document TN/DS/25 of 21 April 2011
- Historical development of the WTO dispute settlement system: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm
- Force of argument, not argument of force: http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief10_e.htm

Further readings and resources:

- "DSU Negotiations", by Peter Van den Bossche, WTO Conference Paper, Taipei, November 2003.
- "Negotiating the Review of the WTO Dispute Settlement Understanding", by Thomas A. Zimmermann, Cameron May: London, 2006.
- "Reforming WTO Dispute Settlement", by William J. Davey, Illinois Public Law and Legal Research Series, Research Paper No. 04-01, January 2004, available at: http://ssrn.com/abstract=495386
- "A General Introduction to the Negotiations on DSU in the New Round", by Wenhua Ji, in *WTO Dispute Settlement Understanding: A Detailed Interpretation,* Appendix II, Yang Guohua, Bryan Mercurio, and Li Yongjie, Kluwer Law International, June 2005, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=986161

LESSON 2

What are the proposals under consideration?

Introduction

Key document:
Report of the Chair of the DSB-SS, TN/DS/25

In April 2011, the Chair of the Dispute Settlement Body in Special Session (DSB-SS) issued a report on the state of play of the DSU Negotiations. Based on previous work as well as his own perceptions about the general feelings of the Members involved in the talks, **the Chair proposed a "thematic overview" of twelve issues under discussion:**

- third party rights
- Panel composition
- Remand
- Mutually agreed solutions
- Strictly confidential information
- Sequencing
- Post-retaliation
- Transparency and *amicus curiae* briefs
- Timeframes
- Developing country interests, including special and differential treatment
- Flexibility and Member control
- Effective compliance

In Lesson 2, we take a closer look at some of these issues, in particular those that relate to fixing procedural glitches and improving participation and transparency. Issues specifically related to the participation of developing countries in the DSS are discussed in Lesson 3.

II.A: Fixing procedural glitches

II.A.1: Panel composition

Proposal	Explanation
Developing an **improved procedure** for panel composition.	Members are discussing the possibility of establishing, through a Decision of the DSB, an improved procedure for panel composition, to make the process more efficient and more predictable for parties. The proposal under consideration to achieve this would involve the presentation by the Secretariat of a **single list of potential panelists that the parties would rank**. This would be used as a basis to try to achieve an agreement among parties on the composition of the panel. If the parties cannot reach agreement on that basis, the list would also serve as a basis for composition of the panel by the Director General.
Defining the expertise of panelists	There is broad convergence on the fact that **the individuals serving on panels should have specific expertise related to the matter at issue in a specific case**, and how this could be clarified in the DSU.

II.A: Fixing procedural glitches

II.A.2: "Remand" procedure

1: the proposed new procedure

The Appellate Body's function is limited to the examination of issues of law and legal interpretation developed by panels, hence excluding the possibility to make factual findings. This can lead to difficulties if a factual issue arises at the appellate stage which had not been examined by the panel, for example because the Appellate Body develops a different legal interpretation than that followed by the panel. **The issue therefore may arise as to whether the Appellate Body should have the possibility to remand the case back to the panel for further analysis**.

II.A: Fixing procedural glitches

II.A.2: "Remand" procedure

2: the negotiations

Key document:
Report of the Chair of the DSB-SS, TN/DS/25, p. A-34-35.

Proposal	Explanation
Panels to make additional findings according to procedural and substantive guidelines issued by the Appellate Body	**Members discuss what should be the terms of reference for a panel that is requested** by the Appellate Body **to make additional findings,** including the timeframes, issues to be examined, and further appeal procedures.
Remand procedure not to delay adoption and implementation of reports	**Some Members are concerned that including remand procedures may further delay the issuance of final reports as well as implementation deadlines**.
Which party to the dispute can initiate the remand procedure	**Members discuss whether it should be for the complainant, the respondent, or the party who raised the specific issue that forms the object of the referral procedure, to have the right to initiate such procedure.**

II.A: Fixing procedural glitches

II.A.3: Sequencing

1: The issue

The word “sequencing” refers to a situation where the complainant claims that the respondent has not implemented the rulings in due course and, as a consequence, wants to take retaliatory actions. **Two DSU Articles are under review in this case**:

Article 21.5	Where the parties disagree on whether the rulings have been implemented or not, a panel examines the dispute and reports **within 90 days**.
Article 22.2	If the respondent fails to implement, the complainant can ask the DSB to authorize it to retaliate. Article 22.6 states that, **within 30 days** from the end of the reasonable period of time for implementation, the DSB authorizes the complainant to retaliate.

From the language of these provisions, it is not clear whether the authorization to retaliate is conditional on a finding under Article 21.5 of the DSU that the implementing Member has not fully implemented measures that would fix the original violation. **This issue is currently solved through *ad hoc* agreements between WTO Members.**

II.A: Fixing procedural glitches

II.A.3: Sequencing

2: The negotiations

Key document:
Report of the Chair of the DSB-SS, TN/DS/25, p. A-36.

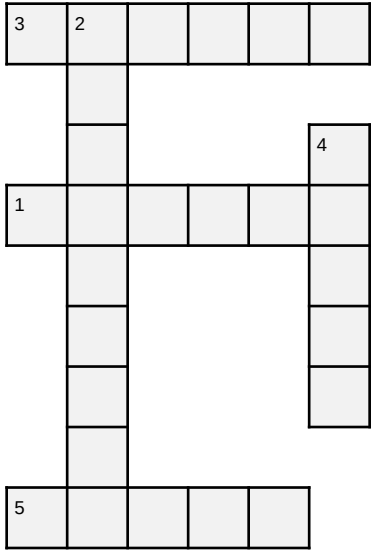
Proposal	Explanation
Clarifying the possibility for **consultations prior to initiating compliance panel proceedings**.	**Members discuss the possibility of including in the DSU an express indication that consultations are possible, though not required,** before the establishment of a "compliance panel" under the relevant provision (Article 21.5).
Improved **notification** to the DSB of measures taken to comply.	Members discuss the possibility of including in the DSU more detailed requirements for the notification that the implementing Member has to present to the DSB to **explain how it has complied,** including the possibility to present the text of the draft measure taken to comply.
Which party should have the possibility of **initiating compliance proceedings**.	Members discuss the possibility of clarifying, in the text of the DSU that the **complaining party should be the one to initiate compliance panel proceedings**.

Test your knowledge!

Can you find the words?

Definition

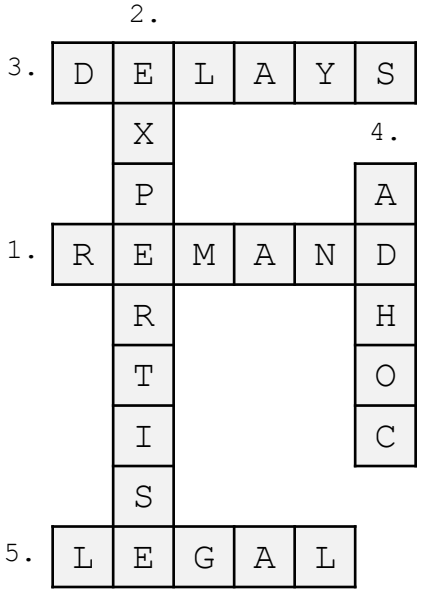
1. The possibility of referring a case back to the panel for further analysis
2. Members discuss whether panelists should have both experience and …
3. Some Members are concerned that a remand procedure could lead to further … (plural)
4. Sequencing is currently solved through this type of agreements between Members
5. The Appellate Body currently examines only these issues (adjective)



Test your knowledge!

Answer:

Definition
1. The possibility of referring a case back to the panel for further analysis 2. Members discuss whether panelists should have both experience and … 3. Some Members are concerned that a remand procedure could lead to further … (plural) 4. Sequencing is currently solved through this type of agreements between Members 5. The Appellate Body currently examines only these issues (adjective)



II.B: Participation & transparency

II.B.1: Third parties

Key document:
Report of the Chair of the DSB-SS, TN/DS/25, p. A-36.

1: the proposed improvements

A WTO Member that is neither the complainant nor the respondent in a dispute may participate as a "third party“ (or "third participant" at the appellate stage). Third parties enjoy some rights, such as the opportunity to be heard by the panel and to make written submissions, provided they express a "substantial interest" in the matter before a panel (Article 10.2 of the DSU). **Over the years, the practice has evolved that WTO Members sometimes ask panels to grant enhanced, or extended, third party rights, which would allow them, for instance, to be present in all the phases of the proceedings, and/or to receive all the submissions filed by the parties.**

Some Members felt that the time has come to institutionalize these practices by adding language to that effect in the relevant provisions of the DSU.

What are the criteria developed in WTO rulings to grant enhanced third party rights? TO KNOW MORE, click here!

TO KNOW MORE: WTO rulings on requests for enhanced third party rights

Enhanced third party rights have been granted, for instance, by the Panel in *EC – Bananas III* (WT/DS27). In para. 7.6 the Panel held that:

"[H]aving considered representations by the Complainants, the EC and third parties, we decided prior to our first substantive meeting with the parties that, in addition to the rights specifically provided for in the DSU, third parties in this dispute would be invited to observe the whole of the proceedings at that meeting and not just the one session thereof set aside for hearing third party arguments."

The Panel on that occasion granted enhanced third party rights on the basis of: 1) the "large economic effects" of the measure at issue on certain third parties; 2) "economic benefits to certain third parties" originating from the measure at issue; 3) "past practice in panel proceedings"; and 4) the fact that "the parties to the dispute could not agree on this issue". (*ibid*. para. 7.8).

In *EC – Tariff Preferences*, para. 7, Annex A, the Panel justified its decision to grant enhanced third party rights by stating that:

"(a) There are significant similarities between this case and that of *EC – Bananas III* (WT/DS27) in terms of economic impact of the preference programmes on third party developing countries. Both those third parties that are beneficiaries under the EC's Drug Arrangements and those that are excluded have a significant economic interest in the matter before this Panel.
(b) The outcome of this case could have a significant trade-policy impact on the US as a preference-giving country.
(c) As a matter of due process, it is appropriate to provide the same procedural rights to all third parties in this dispute.
(d) In granting any additional rights to third parties, it is important to guard against an inappropriate blurring of the distinction drawn in the DSU between parties and third parties."

BACK TO COURSE

II.B: Participation & transparency

II.B.1: Third parties

Key document:
Report of the Chair of the DSB-SS, TN/DS/25, p. A-33.

2: the negotiations

Proposal	Explanation
Institutionalizing certain additional third party rights granted by panels on a case-by-case basis	Members have expressed support for including in the DSU positive language that would **enhance third party rights at the panel stage**, including the right to be present at the substantive meetings with the parties and respond to questions. Other Members have expressed a preference for maintaining the current case-by-case practice. Members are also discussing whether the granting of further additional third party rights should depend on a decision of the panel (after consultations with the parties), or exclusively on an agreement of the parties to that effect.
Possibility of **becoming third parties for the first time at the appellate stage** of a dispute	According to current rules, a WTO Member that has not been a third party at the panel stage is excluded from participation in the appellate review. Members are discussing the possibility of opening third party participation at the appellate stage also for newly interested Members, but some have expressed concerns that this might create additional burdens for the Appellate Body proceedings, including the hearings.

II.B: Participation & transparency

II.B.2: Transparency and *amicus curiae* briefs

1: The issue

In DSS practice, some issues related to transparency of proceedings – such as public access to meetings and public availability of Members' submissions – have been left to the discretion of individual Members and adjudicators.

Moreover, there are divergent views among Members on whether non-Members may play a role in WTO dispute settlement proceedings, for example, by filing unsolicited *amicus curiae* ("friend of the court") submissions. **According to previous rulings, Article 13 of the DSU leaves panels and the Appellate Body with the choice to accept or reject these submissions** (see *US – Shrimp*, Appellate Body Report, paras. 105 - 110; and, *EC – Sardines*, Appellate Body Report, paras. 165 & 167). In DSS practice, such briefs have most often been considered when attached to the submission of a party (see e.g. Appellate Body Report, *US - Shrimp*, paras. 89 - 91).

Visit this page to see examples of "*amicus briefs*" submitted to WTO tribunals.

II.B: Participation & transparency

II.B.2: Transparency and *amicus curiae* briefs

Key document:
Report of the Chair of the DSB-SS, TN/DS/25, p. A-37-39.

2: The negotiations

Proposal	Explanation
Opening panel and Appellate Body hearings to the public	**Members discuss the possibility of opening hearings at both panel and appellate review stages to the public.** This practice has been followed in some cases where the parties to a dispute agreed to it. (see e.g. *EC – Continued suspension*).
Access to submissions	**Members discuss the possibility of making submissions to WTO adjudicators available to the general public**. The possibility of presenting a non-confidential version of the submission at the request of a Member is already foreseen by the DSU (Article 18.2), albeit without specific details as to when and how this might be requested and obtained.
Amicus curiae briefs	**Members discuss the possibility of regulating the modalities for presenting *amicus curiae* briefs, including timing, length, and conditions for admissibility**. Some Members have proposed to establish a prohibition on accepting unsolicited briefs, while others have stressed that non-Members should not be granted easier access to the proceedings than WTO Members, whose participation is regulated by rules applying to participation as third-parties.

Test your knowledge!

Match the following statements:

Asking panels to grant enhanced third party rights…

With respect to transparency, Members are discussing whether…

Where a non-Member files a submission with a WTO adjudicator,…

…*amicus curiae* briefs would be received by WTO adjudicators but not necessarily taken into account in their reports.

…is a practice that has evolved over the years.

… opening hearings to the public and publishing submissions should become the rule.

Test your knowledge!

Answer:

Asking panels to grant enhanced third party rights…

With respect to transparency, Members are discussing whether…

Where a non-Member files a submission with a WTO adjudicator,…

…*amicus curiae* briefs would be received by WTO adjudicators but not necessarily taken into account in their reports.

…is a practice that has evolved over the years.

… opening hearings to the public and publishing submissions should become the rule.

II.C: Takeaway messages from Lesson 2

Lesson 2 has discussed the following key points:

- Members are discussing the possibility of introducing new practices for panel composition, along with the inclusion of additional substantive requirements for the individuals who will serve as panelists.
- Members are discussing the idea of creating a remand procedure, whereby, in certain circumstances, the Appellate Body could “remand” a case back to the panel level for further analysis.
- The proposals on “sequencing” would involve the DSB granting an authorization to retaliate only after a determination has been made on whether the respondent has effectively implemented the recommendations of the DSB, where there is disagreement on this issue.
- Members are discussing the idea of including clearer rules on the participation of third parties in dispute settlement proceedings.
- Amongst all the issues that are being considered for improvement by WTO negotiators, some, such as enhanced third party rights at the panel stage or clarifying the expertise of panelists, have gathered significant support on the need for clearer rules.

II.D: Suggested readings and resources

References for Lesson 2:

- Report by the Chairman, Ambassador Ronald Saborío Soto to the Trade Negotiations Committee, WTO Document TN/DS/25 of 21 April 2011

Further readings and resources:

- "Negotiating the Review of the WTO Dispute Settlement Understanding", by Thomas A. Zimmermann, Cameron May: London, 2006.
- "Appeal without Remand: A Design Flaw in the World Trade Organization (WTO) Dispute Settlement and How To Fix It", by Joost Pauwelyn, ICTSD Issue Paper, June 2007, available at: http://ictsd.org/i/publications/11301/.

LESSON 3

What are the proposals on issues of particular interest for developing countries?

Introduction

A number of proposals address issues related to developing country interests, including but not limited to special and differential treatment (S&D). Some of these proposals are sketched out in this Lesson, in particular those related to:

- **The effective participation of developing countries in the DSS;**
- **The consideration of the interests of developing countries in consultations/panel proceedings;**
- **Mechanisms for effective compliance; and**
- **The determination of the reasonable period of time for implementation**.

Other proposals of special interest to developing country Members relate to, for instance, mutually agreed solutions, third party rights, timeframes, and requests for the establishment of panels where the respondent is a developing-country Member.

III.A: Effective participation of developing countries in the DSS

A widely acknowledged **systemic issue** in the WTO DSS is the relatively limited participation of some developing and least-developed country Members in the system, which they have explained is due in part to a lack of financial and/or human resources.

Proposal	Explanation
Creating a Dispute Settlement Fund for developing countries and **refunding litigation costs to developing countries who prevail in disputes**	Members are discussing **who the beneficiaries of such support would be**, in light of the concern expressed that the situations of individual developing countries in respect of human and financial resources available for dispute settlement may vary considerably. They are also discussing **the relationship of the proposals with existing solutions**, including technical assistance provided by the WTO Secretariat, and especially legal assistance by the Advisory Centre on WTO Law (ACWL), and its added value compared to these solutions. The **operational details** of both mechanisms, **including budgetary implications**, are also under discussion.

III.B: Consideration of the interests of developing countries in consultations

Several proposals seek to ensure that adequate consideration will be given to developing country interests in consultations.

Proposal	Explanation
Strengthening the existing S&D provision in the DSU (Article 4.10), and defining further requirements to be followed during the consultations and in any subsequent panel request	A number of Members seek clarification as to **what exactly the proposed requirements entailed and what sort of situations they intended to cover**. Clarification was also sought of the intended legal implications, in any subsequent panel proceedings, of such requirements.

III.C: Mechanisms for effective compliance

Proposal	Explanation
Making cross-retaliation available to developing country defendants without requiring specific justification	The proposal would **exempt successful developing country complainants from the need to justify why same-sector or same-agreement retaliation is not practicable or effective**. In discussions of this proposal, several Members recognized the possible challenges for smaller economies of retaliating effectively against larger trading partners. Some **Members have commented that this concern was not limited to developing country complainants and that it could arise also where the complainant was a developed country Member.**

III.D: The determination of the reasonable period of time for implementation

Proposal	Explanation
Arbitrators determining the reasonable period of time (RPT) for implementation under Article 21.3(c) of the DSU **should take into account the particular problems and interests of developing countries**	**The intent of this proposal is to codify existing practice**, **to ensure that due consideration would be given where necessary to developing country interests, especially where, as respondents, they may need additional time to comply**. While some Members appear to agree that in practice, arbitrators under Article 21.3(c) already took into account such interests and did not question the legitimacy of such practice, other Members sought further clarification of the intent of the proposal, and whether or not it would simply confirm existing practice.

Test your knowledge!

Match the following issues related to developing country interests to either systemic or procedural:

SYSTEMIC	PROCEDURAL
	Automatic right to cross-retaliate
	Longer RPTs for implementation where necessary
	Stronger due restraint norms
	Dispute Settlement Fund
	Refunding litigation costs to successful developing country complainants

Test your knowledge!

Answer:

SYSTEMIC	PROCEDURAL
Dispute Settlement Fund	Longer RPTs for implementation where necessary
Refunding litigation costs to successful developing country complainants	Stronger due restraint norms
	Automatic right to cross-retaliate

III.E: Takeaway messages from Lesson 3

Lesson 3 has discussed the following key points:

- Developing country Members have advanced proposals to solve certain systemic access issues, and to improve the way in which certain aspects of the procedures take into account developing country interests. Among the access issues addressed by these proposals appear the idea of creating a Dispute Settlement Fund, to overcome the financial constraints that may structurally hinder the ability of developing country Members to participate effectively in the DSS. The proposal to refund litigation costs incurred by developing country Members where their arguments prevail in a dispute goes along similar lines.
- Among the procedural issues that developing country Members have considered in their proposals appear: 1) strengthening the provisions of Article 4.10 of the DSU on consultations; 2) codifying the practice of arbitrators acting under Article 21.3(c) of the DSU to grant longer RPTs for implementation to developing country respondents where appropriate; and 3) rendering the possibility to cross-retaliate automatic for developing-country complainants.

III.F: Suggested readings and resources

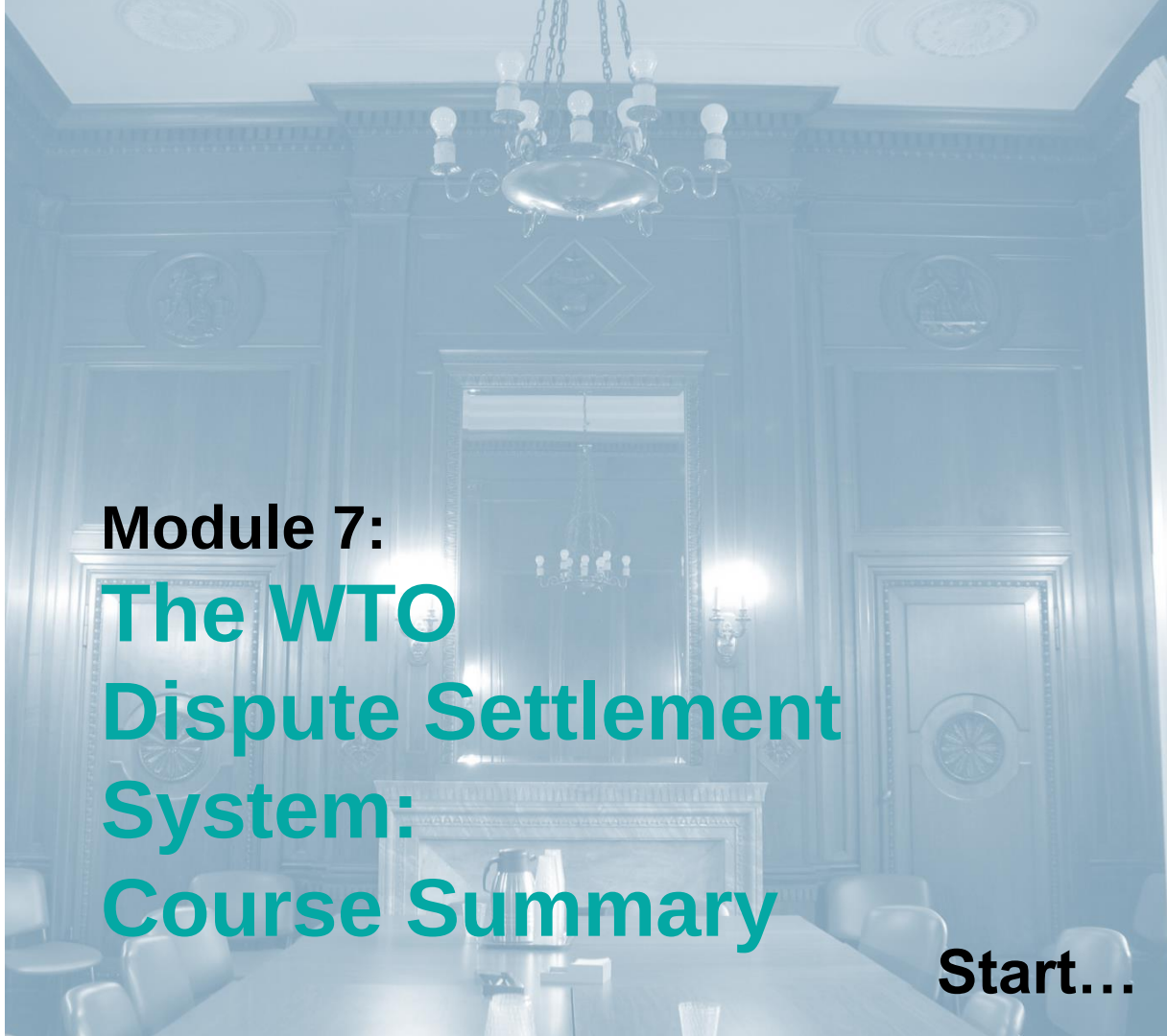
References for Lesson 3:

- Report by the Chairman, Ambassador Ronald Saborío Soto to the Trade Negotiations Committee, WTO Document TN/DS/25 of 21 April 2011

Further readings and resources:

- "DSU Negotiations", by Peter Van den Bossche, WTO Conference Paper, Taipei, November 2003.
- "Negotiating the Review of the WTO Dispute Settlement Understanding", by Thomas A. Zimmermann, Cameron May: London, 2006.
- "Dispute Settlement at the WTO: The Developing Country Experience", Edited by Gregory C. Shaffer and Ricardo Melendez-Ortiz, Cambridge University Press, 2010
- "Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement", by Jan Bohanes & Fernanda Garza, Trade, Law and Development, Summer 2012, Vol. IV, No. 1, available at: http://www.tradelawdevelopment.com/index.php/tld/issue/view/4%281%29%20TL%26D%20%282012%29
- 'Developing Country Success in WTO Disputes', by Kristina M.W. Mitchell, Journal of World Trade 47,no.1 (2013):77–104.
- ICTSD project on WTO Dispute Settlement, various papers, available at: http://www.ictsd.org/search?search_api_views_fulltext=dispute%20settlement&f[0]=type%3Aresearch#main-content-container

WTO/OMC
E-LEARNING



Module 7:

The WTO Dispute Settlement System: Course Summary

Start…

Introduction

Congratulations!

"Congratulations, you have reached Module 7 of the E-Learning course on the WTO Dispute Settlement System. This module offers a summary of the previous six modules.

Thanks to your engagement in this learning experience, you are now acquainted with the functioning of the WTO Dispute Settlement System, as well as its main characteristics.

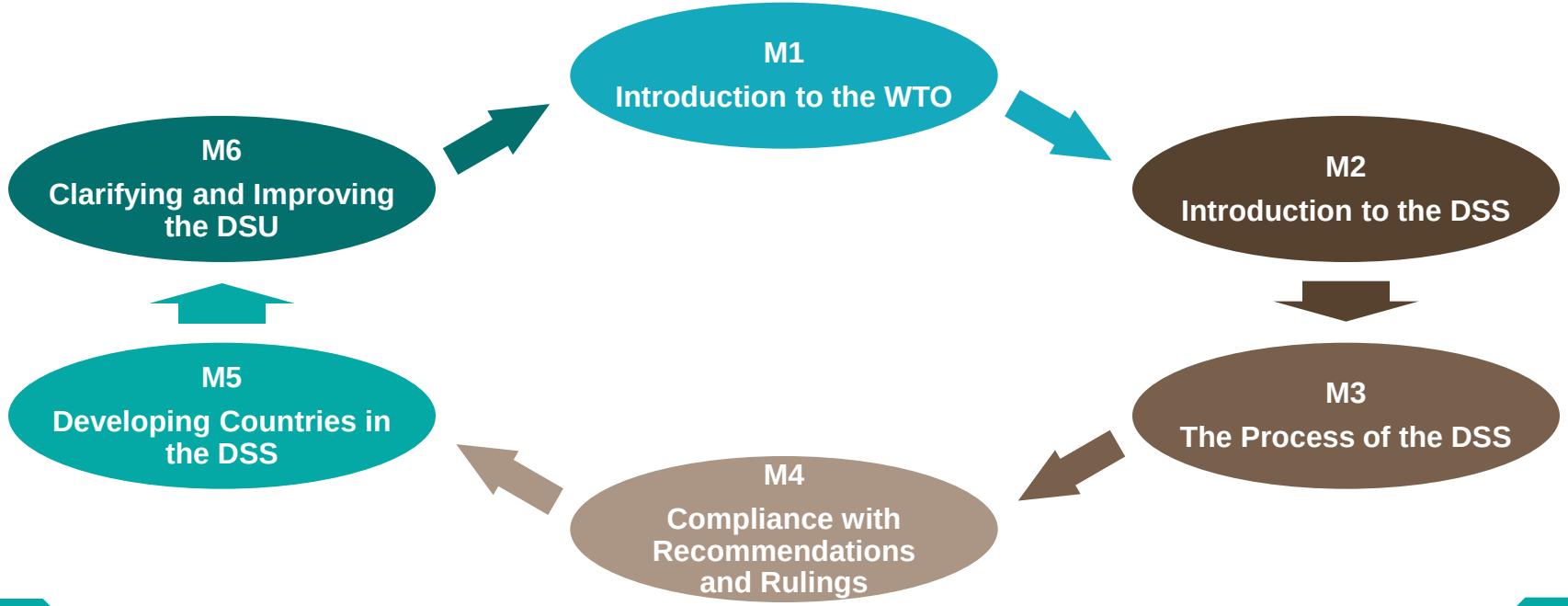
The objective of Module 7 is to provide you with a general overview of the key subjects discussed in modules 1 through to 6. ***Please recall that the Final Exam is based on the content of the whole course, not only of Module 7!!***

Good luck, and thank you for your participation. We look forward to seeing you online again in the future!"

Introduction

Structure

This module is divided into **six summaries, one for each module of the course**.



Module 1: Introduction to the WTO

This Module provided an overview of the objective, functions and functioning of the WTO. The WTO serves as a forum for Member governments to negotiate multilateral trade rules. It facilitates the smooth flow of global trade through the monitoring of a rules-based system, the so-called multilateral trading system (MTS). These rules are contained in the WTO Agreement, which consists of several legal documents covering trade in goods, trade in services and trade-related aspects of intellectual property rights.

The WTO Agreement can be seen as a set of rights and obligations that apply to the Members of the organization. It is based on a number of basic principles, which constitute the foundation of the MTS. The main principles include non-discrimination (MFN and national treatment), more open and predictable trade (lowering trade barriers), transparency and the development dimension (special flexibilities for developing countries and LDCs). These main principles apply horizontally across all the Agreements, although not always in the same way.

At the same time, the WTO Agreement allows Members to deviate from their obligations in certain circumstances in order to meet certain legitimate policy objectives, subject to specific conditions.

The WTO also serves as a forum for Member governments to settle their trade disputes. The rules and procedures for the settlement of disputes are set out in the DSU, which is under the administration of the DSB. This mechanism allows the Members to enforce the obligations contained in the WTO Agreement. The procedures for the settlement of trade disputes among WTO Members are the subject of this course on the WTO DSS.

Module 2: Introduction to the WTO Dispute Settlement System

This Module provided an overview of the WTO DSS and introduced the main features of the system. The WTO DSS constitutes one of the major outcomes of the Uruguay Round. While based on the old GATT dispute settlement mechanism, the current WTO DSS offers an enhanced mechanism that provides clearly-defined rules, applicable to dispute settlement proceedings, including timeframes, an innovative decision-making system to ensure the adoption of rulings, an appellate review and a monitoring and surveillance mechanism.

The DSS provides security and predictability to Member governments and traders by allowing the Members to enforce the rights and obligations under the WTO covered agreements. In that way, the WTO DSS helps to preserve the delicate balance achieved in WTO negotiations. The objective of the system, however, is not to pass judgement. A mutually agreed solution acceptable to the parties to the disputes is always to be preferred. This is reflected in the ways provided for settling disputes and the different stages of a formal dispute settlement process, which starts with consultations among the parties.

There are different “actors” in the WTO dispute settlement process and each one has a different role to play. While only WTO Members enjoy a right of access to the mechanism, non-state actors are showing more interest in WTO disputes. The function of WTO adjudicating bodies is to settle trade disputes under the WTO “covered agreements”; that means that they cannot adjudicate rights and obligations outside those agreements. The figures on the participation of Members in the DSS since the creation of the WTO underscore its success and the increasing use of the mechanism by both developed and developing Members.

Module 3: The WTO Dispute Settlement process

This Module provided an overview of the WTO dispute settlement process, starting from consultations, continuing with the stage of adjudication before the panel and Appellate Body (in case of appeal), and up to the adoption of the panel and Appellate Body reports by the DSB.

The DSU sets out in considerable detail the procedure and timetable for the various stages. In doing so, the DSU provides an effective mechanism to settle disputes, which has contributed to the stability and predictability of the MTS. Since the preferred outcome of the DSU is for the Members concerned to find a mutually agreed solution in accordance with the WTO Agreement, the first formal stage of the WTO DSS is consultations. They are a mandatory stage of the proceedings: only after such consultations have failed may the complainant pass to the stage of adjudication. Consultations afford many benefits not only to the parties, but also to the system as a whole, as they allow disputes to be settled at this earlier stage or, if no agreement is reached, to understand better the matter in dispute.

Only if consultations have failed to settle the dispute, the party concerned may request the establishment of a panel to adjudicate the dispute. Thus, if a mutually agreed solution is not possible, the panel stage will provide the complainant with an option to protect its rights or uphold its benefits under the WTO covered agreements. The panel will examine the validity of the complainant's claim that the respondent has acted inconsistently with its WTO obligations. Either party may appeal the report of the panel, but only with respect to issues of law. The Appellate Body's main function is to correct legal errors of the panel and provide consistency of decisions, contributing in this way to the stability and predictability of the system. The reports of the panel and Appellate Body have to be adopted by the DSB before becoming binding exclusively for the parties to the dispute. The adoption of the reports is quasi-automatic given the negative consensus rule.

Module 4: Compliance with Recommendations and Rulings of the DSB

This Module provided an overview of the mechanisms available under the DSS to ensure compliance with the recommendations and rulings of the DSB, once the latter has adopted the panel (and Appellate Body) report(s). A WTO Member whose measure has been found to be inconsistent with the covered agreements may generally choose between either withdrawing or modifying the measure at issue. Where the infringing measure is found to be either a prohibited or an actionable subsidy, within the meaning of the SCM Agreement, special rules will apply. If immediate compliance is “impracticable”, WTO Members can invoke a reasonable period of time for implementation (RPT); during the RPT, the respondent cannot yet be the target of countermeasures. The RPT can be proposed by the respondent, agreed between the parties, or decided through binding arbitration. The second option is followed by WTO Members in the majority of cases.

If the parties disagree on whether the measures taken to comply with the DSB recommendations and rulings actually achieve their objective, either party can request that a new panel examine the issue (the so-called “compliance panel”). The Appellate Body has clarified that compliance panels must consider the new measure in its totality, including, where there are claims to this effect, its consistency with a covered agreement other than the one originally violated by the measure at issue.

Module 4: Compliance with Recommendations and Rulings of the DSB

On the other hand, in cases where a violation has been found, but the respondent has not yet fully implemented the DSB recommendations and rulings, the DSS provides two types of temporary remedies: seeking compensation, which must be WTO-consistent and mutually agreed between the parties; or, where compensation cannot be agreed upon, requesting from the DSB an authorization to suspend concessions or other WTO obligations. The purpose of both these remedies is inducing compliance with the original recommendations and rulings of the DSB.

When a complaining Member is considering whether to impose countermeasures, it has to abide by a quantitative, and a qualitative, requirement: the former means that the level of suspension of concessions or other obligations authorized by the DSB must be "equivalent" to the level of nullification or impairment; the latter means that, provided certain conditions are fulfilled, the Member concerned can decide in which sector and under which agreement to suspend concessions or other obligations.

Finally, if there is disagreement on the level of suspension, or on whether the applicable DSU disciplines have been followed by the retaliating Member, the matter can be referred to arbitration.

Module 5: Developing countries in the WTO Dispute Settlement System

This Module provided an overview of the participation of developing-country and LDC Members in the DSS. Over the first 17 years of existence of the WTO DSS, and in spite of the practical burdens they face, many developing-country Members have been active participants in the system. LDC Members, on the other hand, have been directly involved in proceedings (i.e., as complainants or respondents) in only one case, which was solved through a mutually agreed solution; however, they have been involved as third parties more frequently. The participation as "third party" offers important advantages, especially to developing country Members, who can gain valuable experience in the dispute settlement proceedings without getting directly involved as a party.

It is generally agreed that the very existence of a compulsory multilateral dispute settlement system provides in itself a benefit for developing countries and small economies. This system enables all Members to resolve trade disputes in a fair, predictable and rapid manner. However, some commentators challenge these views as being too theoretical. In this context, it is a fact that improving the ability of developing country Members to make effective use of the dispute settlement system is essential for them to be able to reap the full benefits to which they are entitled under the WTO Agreement.

Module 5: Developing countries in the WTO Dispute Settlement System

S&D rules, or provisions, exist in the DSU and apply at the consultation, panel, and implementation stages: S&D norms at the consultations stage can have effects, for instance, on the duration of consultations; S&D provisions at the panel stage have effects on panel composition, time periods and formulation of findings in panel reports; S&D at the implementation stage can have several effects, including on the calculation of the length of the RPT for implementation. Moreover, the “accelerated procedures” of the Decision of 5 April 1966 are available, if requested, to developing country Members. The special and differential treatment provisions apply to LDC Members, which are part of the group of developing country Members. In addition, the DSU sets forth a number of additional rules applicable only to LDC Members.

Finally, developing countries and LDCs can rely on the legal services of the Advisory Centre on WTO Law (ACWL), which is a "legal aid" centre in the form of an independent intergovernmental organization. The ACWL is separate and independent from the WTO, and provides legal assistance to its beneficiaries at affordable rates. Both the WTO Secretariat and the ACWL provide “legal opinions”, which generally are analyses on the viability of claims of breach of WTO obligations, or of defences of measures that might breach those obligations; moreover, the ACWL provides legal representation in WTO proceedings for developing countries and LDCs; in the case of developing countries, the rates charged by the ACWL depend on their level of economic development, and on whether they are members of the ACWL.

Module 6: Negotiations to Improve and Clarify the DSU

This Module provided an overview of some of the reform proposals discussed by WTO Members with a view to clarifying and improving some of the disciplines of the DSU. Indeed, the WTO DSS has introduced a number of new features and is substantially different from its predecessor, the GATT DSS. As a consequence, a review of the DSU was already established at the end of the Uruguay Round. This review evolved into a fully-fledged multilateral negotiation, launched with the Doha Round; however, due to the special nature and systemic importance of the DSU reform, the latter has been carved out from the Doha Round principle of the single undertaking, which bundles the destiny of the various subjects under negotiation and expands bargaining dynamics.

Various subjects are being considered by WTO negotiators for reform, including sequencing, remand or referral procedures, as well as special and differential treatment for developing countries. “Sequencing” refers to a situation where the DSB could, in line with the DSU, grant an authorization to retaliate while a determination of whether the respondent has effectively implemented the recommendations of WTO tribunals is still on-going. Many Members deem that this situation that needs clarification; it is currently dealt with through *ad hoc* agreements between the disputing parties.

Amongst the other changes or additions proposed to DSS procedures, Members are discussing the idea of including clearer rules on the participation of third parties in dispute settlement proceedings, as well as the idea of creating a referral procedure, whereby, in certain circumstances, the Appellate Body could “remand” a case back to the panel level for further factual analysis.

Module 6: Negotiations to Improve and Clarify the DSU

Developing country Members have advanced proposals to solve certain systemic issues, and to modify certain dispute settlement procedures. Among the systemic issues addressed by these proposals is the idea of creating a Dispute Settlement Fund, to overcome the financial constraints that may structurally hinder the ability of developing country Members to participate effectively in the DSS. The proposal to refund litigation costs incurred by developing country complainants where the latter's arguments prevail in a dispute goes along similar lines.