



Managing Disputes Over Trade

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Outline

- Introduction
- WTO dispute Settlement Mechanism
- Dispute Settlement Mechanisms in FTAs
- Special Problems Facing Developing Countries
- Role of Domestic Institutions

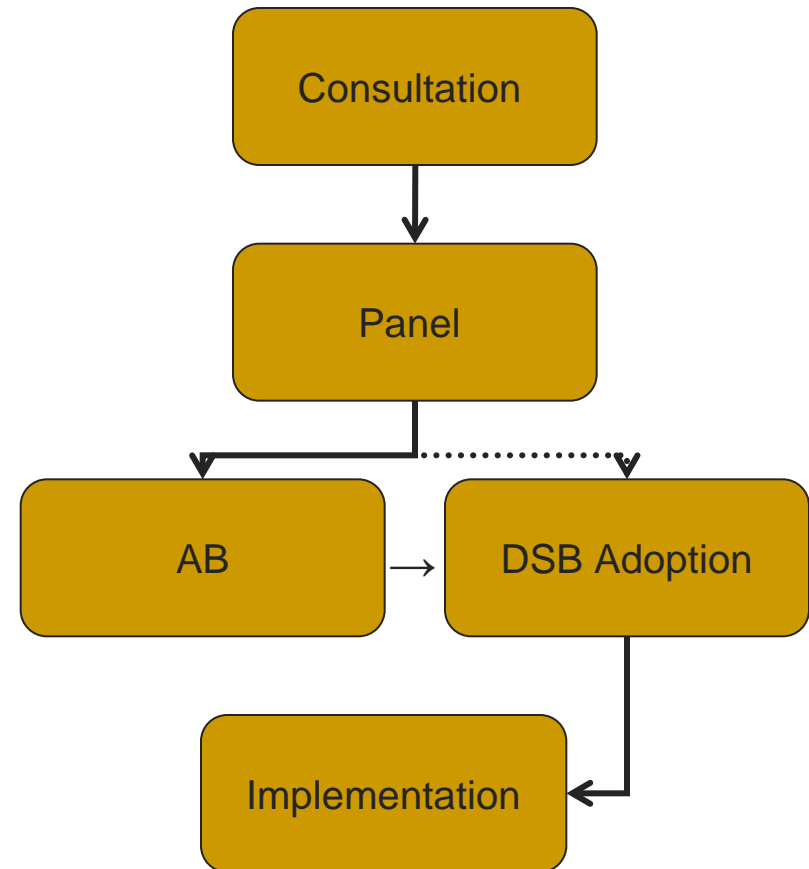
Overview

- **Nullification or impairment of any benefit by measures taken by another Member**

- Measure infringes WTO obligation? ⇒ **Presumed (Art. 3.8)**
- Measure does not infringe WTO obligation? ⇒ **to be proved** by the claimant (Art. 26)

Main stages

- Consultation
- Panel and Appellate Body review
- Adoption of report by the DSB
- Implementation



Consultations

- **The request for consultations:**

- Indicates the reasons for the request; identification of the measures; legal basis for complaint
(Art 4.4)



- Notified to DSB and circulated to all Members in “WT/DS” document series

[Consultations]

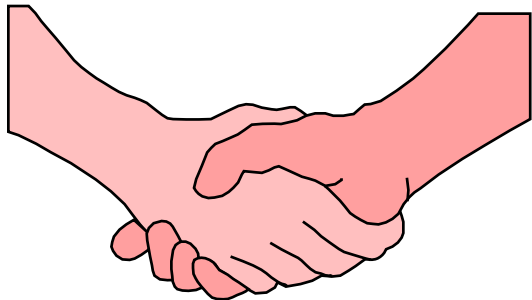
- Confidential consultations, between the Members concerned (Art. 4.6)
- Undertaking to “accord sympathetic consideration to and accord adequate opportunity for consultation...” (Art. 4.2)

Consultations

- **In many instances, disputes have been resolved at the consultation stage, without further proceedings:**

AS OF 10/27/2006:

- 351 Disputes (Consultation Requests)
- 145 Panels established, covering 178 of the 351 disputes formally initiated (about one-half).
- 123 panels have been composed, covering 159 disputes



Establishment of panels

- The request for establishment of a panel:
 - “identify the specific measures at issue and provide a brief summary of the legal basis of the problem sufficient to present the problem clearly” (Art 6.2)
- Establishment at the latest at “DSB meeting following that at which the request first appears on the DSB’s agenda”, by reverse/negative consensus (Art. 6.1 DSU)



Composition of Panels

- Panel Composition:
 - “well-qualified government and /or non-governmental individuals” (8.1)

- Indicative list of panellists (8.4)
- Secretariat proposals (8.6)
 - Not necessarily from the indicative list
- Nomination by DG if no agreement (8.7)
 - 1/3 in the first 5 years
 - 2/3 in the second 5 years

Panel procedures

- Working Procedures (DSU Appendix 3)
- Submissions and meetings
- Issuance of descriptive part to parties
- Interim review
- Final report issued to parties
- Final report circulated to all Members

Panel Procedures (2)

- Function of panels (Art. 11):
 - Objective assessment of the matter before it, including facts and the applicability of and conformity with the relevant agreements

- What should the report contain? (Art. 12.7)
 - Findings of fact,
 - applicability of relevant provisions and
 - basic rationale supporting any finding and recommendation.

Adoption of Panel Reports (16)

- Panel reports not considered for adoption until 20 days after circulation



- Adoption **within 60 days of circulation**, by reverse consensus....

- ... **Except if appealed**

Panel Procedures: Deadlines

- As a general rule, **6 months** from composition/terms of reference to issuance of final report of the panel to the parties
 - (Art. 12.8 DSU)
- As a general practice, **9 months** from establishment of panel to consideration of report for adoption (if no appeal)
 - **12 months** where report is appealed
 - (Art. 20 DSU)

Appellate Review

- A Standing Body
- Innovation of the WTO over the GATT and other international Tribunals: legitimacy?
- Appeals limited to “issues of law ...and legal interpretations developed by the panel” (Art. 17.6 DSU)
- Appeal only open to parties to the dispute (17.4)

[Standing Appellate Body (AB)]

- Composition: 7 Members
- Appointed by the DSB
- Term of Office: 4 years (renewable once)
- Requirements:
 - demonstrated expertise in law, international trade
 - unaffiliated with Member government

The current members of the AB (Dec 09-)



Procedure of Appellate Review

- Notice of Appeal
- Written submissions
 - Appellant
 - Appellee
 - Third participant
- Oral hearing
- Exchange of views
- Circulation of report



Appellate Body Report

- **Report of the Appellate Body:**
 - “The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel” (Art. 17.13)
- **Adoption of Appellate Body report:** by reverse consensus within 30 days of circulation to Members (Art. 17.14)

Implementation

- **Recommendations:**
 - If violation: recommendation that the Member **bring the measures into conformity**
 - If No violation (but impairment): mutually satisfactory adjustment
- Within 30 days of adoption of report, Member concerned informs the DSB of its **intentions in respect of implementation** of the recommendations and rulings (Art. 21.3)

Immediate compliance not possible?

- Determination of “**reasonable period of time**” for implementation:
 - proposed by Member and approved by DSB by consensus (never happened), or
 - mutually agreed by the parties, or
 - determined through **arbitration**: “guideline for the arbitrator”: not longer than 15 months from the date of adoption - in practice, usually 8-9 months



[Complied or not?]

- **Surveillance by the DSB:** Status reports on implementation
- If Member fails to bring measure into conformity within reasonable period of time, possibility of **temporary** measures: **compensation** or “**suspension of concessions**” (retaliation)

[Complied or not?]

- **Disagreement? (Art. 21.5)**
 - “recourse to these dispute settlement procedures”
 - Back to original Panel
 - 90 days to circulate report
 - Possibility to appeal

[No compliance?]

■ Compensation:

- voluntary
- negotiated
- compatible with WTO obligations
- If no compensation agreed within 20 days after expiry of reasonable period of time....

[No compensation?]

■ Suspension of concessions:

- same sector/other sector/other agreement
- level of suspension: “equivalent to the level of nullification or impairment” (Art. 22.4 DSU)
- authorization to suspend: within 30 days of expiry of reasonable period of time (reverse consensus)
- arbitration on level of suspension or consistency with principles of Art. 22.3 (22.6)

Dispute Settlement Mechanisms in FTAs

- Choice of Dispute Settlement Methods
 - Diplomatic v. Judicial Approach
- Choice of Dispute Settlement Forum
 - WTO or FTA?
- Reality Check: How Useful are Dispute Settlement Mechanisms in FTAs?
 - Not very useful in practice

Problems Facing Developing Countries

- The complexity of the DSM & the WTO Legal System
- Financial constraints
- Lack of expertise and human resource
- Inability to retaliate

Practical Solutions

- Capacity Building
 - Training programs: TPC, RTPC, Specialized Seminars
 - Work at the Secretariat: WTO Internship Program, PhD Support Program, Dutch Trainee Program, staff vacancies

Practical Solutions

- Practice:
 - Participation as third parties
 - Participation as co-complainants

Practical Solutions

- Outsourcing:
 - ACWL
 - Law firms from developed countries
 - Professors, researchers from developed & developing countries
 - Engage the private sector

Role of Domestic Institutions

- Mechanisms to build public-private partnership:
 - US: Section 301
 - EU: Trade Barrier Regulation
 - China: Trade Barrier Investigation Mechanism