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Arbitration at the WTO: A *Terra Incognita* to be Further Explored

**LAURENCE BOISSON DE CHAZOURNES**

**Introduction**

There is no doubt that the WTO dispute settlement system, set out in the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), is ‘unique’, first, because of its compulsory jurisdiction covering any dispute between WTO members, and secondly, because of surveillance and implementation procedures put in place when a decision has been adopted. Another feature, not often highlighted but wisely noted by Florentino Feliciano and Peter Van den Bossche, is that the WTO provides ‘for a multitude of dispute settlement procedures’.

Articles 4 to 20 of the DSU set out in great detail the ‘mainstream procedures’ which rest on consultations, the possibility of establishing a panel, and recourse to the Appellate Body. However, parties to a dispute can agree to resort to other means of dispute settlement, of a more diplomatic nature, such as good offices, conciliation, and mediation. Parties can also resort to arbitration.

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2. Although some of the WTO agreements provide for special and additional rules and procedures ‘designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement’: *ibid.* at pp. 303–4.
3. See DSU Article 5.6. Thus far, there has been only one case of mediation through the Director-General of the WTO. See General Council – Request for Mediation by the Philippines, Thailand and the European Communities – Joint Communication from the European Communities, Thailand and the Philippines, WT/GC//71, 3 August 2003. 
Among the alternative means to the WTO mainstream dispute settlement procedures, arbitration is worth taking into account. Indeed, it stands as a judicial 'alternative means of dispute settlement'. In the context of the DSU, arbitration appears as a stand-alone procedure through Article 25. It can also be seen as a procedure complementing WTO mainstream dispute settlement procedures with respect to specific issues (DSU Articles 21.3 and 22.6).

All dispute settlement procedures, be they mainstream or alternative, are rooted in the DSU. The DSU is the lex generalis, providing substantial and procedural directions to the various types of arbitration that can be initiated at the WTO. Thus, these arbitrations will be imbued with three characteristics underlying the WTO dispute settlement system, i.e., predictability, balance, and confidentiality.

The notions of predictability and balance rest on DSU Article 3.2, which states that 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'. Member states have attempted to circumscribe as much as possible the discretionary power of dispute settlement bodies in their interpretation of WTO agreements provisions, so as to maintain them within the limits set by the agreements.

The predictability notion is associated with the principle of judicial economy. DSU Article 3.7 specifies that 'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.' In US-Wool Shirts and Blouses, the Appellate Body declared that '[g]iven the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels

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4 The concept of arbitration has a long history in international trade, having been identified as a means for settling disputes in the 1947 Havana Charter. However, the idea was not explicitly imported into the GATT 1947, with the result that Contracting Parties failed to make use of this mechanism throughout most of the GATT years. The possibility of resolving disputes through arbitration first appeared explicitly in the 1989 Improvements, but this did not lead to frequent use of the mechanism.' See V. Hughes, 'Arbitration within the WTO' in F. Ortino and E. U. Petersmann (eds.), The WTO Dispute Settlement System, 1995–2003 (Kluwer Law International, 2004), p. 85.

5 See DSU Article 25.1.

6 L. Boisson de Chazournes and M. M. Mbengue, 'Le rôle des organes de règlement des différends dans le développement du droit: à propos des OGM' in Le commerce international des OGM (J. Bourrinet and S. Maljean-Dubois, La documentation française, collection 'Monde européen et international', 2002), pp. 177–212.
or the Appellate Body to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. For instance, a panel must only deal with the necessary allegations to solve the issue at stake in a dispute. These rules impose themselves on arbitrators as well; their powers cannot conceivably go beyond those of panels or the Appellate Body.

Predictability may have another meaning within the framework of arbitration. It implies that arbitrators have been granted access to all necessary information before they deliver their final decision, in order to secure the efficiency of the principle audiet alteram partem. In EC – Bananas III (Ecuador) (Article 22.6 – EC), as the consequence of a plea for a prejudicial decision articulated by Ecuador, the arbitrators, in the context of a procedure under DSU Article 22.6, had considered that DSU Article 22.7 provides that:

‘the parties shall accept the arbitrator’s decision as final and shall not seek a second arbitration’... it is inappropriate to give a ruling on the admissibility or relevance of certain information at this early stage of the proceeding... in past arbitration cases, arbitrators have developed their own methodology for calculating the level of nullification or impairment as appropriate and have requested additional information from the parties until they were in a position to make a final ruling. However, the arbitrators have decided, in light of the concerns regarding due process, to extend the deadline for the submission of rebuttals for both parties... This should give both parties adequate time to respond to the factual information and legal arguments submitted by the other party.

7 Appellate Body Report, United States – Measures Affecting Imports of Woven-Wool Shirts and Blouses from India, WT/DS33/AB/R, 23 May 1997, p.19, paragraph VI. The Appellate Body specified that Article IX of the WTO Agreement provides that the Ministerial Conference and the General Council have the ‘exclusive authority’ to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements. This is expressly recognized in DSU Article 3.9. About the exclusive nature of the power of the two mentioned bodies, see Appellate Body Report, Japan – Taxes on Alcoholic Beverages II, WT/DS8/AB/R, 1 November 1996, p.15; Appellate Body Report, United States – Import Measures on Certain EC Products, WT/DS165/AB/R, 10 January 2001, paragraph 92.


The notion of balance derives from the warning contained in the DSU that dispute settlement bodies should not increase or diminish the rights of WTO member states. This principle is clearly laid down in DSU Articles 3.2 and 19.2. Article 3.2 provides that '[the Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements'. As for DSU Article 19.2, it establishes that 'in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements': These rules apply mutatis mutandis to the different arbitration procedures set by the DSU. This being said, there is a fine line between respecting the balance by not increasing or diminishing the rights of member states and by developing international law.

Confidentiality is an omnipresent principle of the DSU for all proceedings foreseen for dispute settlement among member states of the WTO. This is even more the case in certain procedures such as anti-dumping, subsidies and safeguards, where information from business operators plays a role. Brazil – Aircraft (Article 22.6 – Brazil)\(^{10}\) provides an example where the issue of business confidentiality was at stake. During the proceedings, Brazil had emphasized the confidential character of certain documents it had entrusted to the arbitrators. Considering the severe problems that might be caused by divulging certain commercial or financial information, and the fact that an objective evaluation of facts often depends on an appropriate protection of the confidential information, the arbitrators decided in this case to establish two versions of their report. The first version included the details of the calculation and all the information taken into account. It was delivered to the parties only, on a confidential basis. The most sensitive information – from a commercial point of view – was omitted in the second version, which was distributed to the member states of the WTO.\(^{11}\) The arbitrators thought they had respected their obligations as defined in the DSU,

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\(^{10}\) Appellate Body Report, Brazil – Aircraft (Article 22.6 – Brazil) (not yet reported), paragraphs 2.13–2.14.

\(^{11}\) The text of the version handed to the member states of the WTO was identical to that of the confidential version given to the parties, except for the information the arbitrators considered as confidential, with respect to the parties' observations.
while preserving the confidential character of certain information, for which the parties had requested that status.\textsuperscript{12}

This being said, arbitration at the WTO is coloured with a certain sense of identity, which manifests itself through its role in the WTO multilateral surveillance system. Multilateral surveillance is one of the distinctive features of the dispute settlement system at the WTO. It lies at the origin of the effectiveness and of the efficiency of the dispute settlement bodies' jurisdiction as a whole. Arbitration is summoned at different stages of the multilateral surveillance process.

A first type of arbitration at the WTO is found in the supervision and application phase, following the adoption by the Dispute Settlement Body (DSB) of panel and/or Appellate Body reports and recommendations. The supervision and application proceedings establish that during a meeting of the DSB held within the thirty days following the date of the report or its adoption, the losing party shall have to make known its intentions concerning the application of the recommendations adopted by the DSB (DSU Article 21.3). If the concerned party cannot possibly comply immediately, it will be granted a reasonable period of time to this effect.\textsuperscript{13} The reasonable period of time may be the period of time

\textsuperscript{12} It is true that confidentiality remains one of the distinctive traits of all arbitration proceedings. In an ICSID dispute, \textit{Metalclad v. Mexico}, the arbitral tribunal considered that 'There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration. It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles on Arbitration adopted by the International Law Commission ... The above having been said, it still appears to the Arbitral Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound'. (2001) XXVI Yearbook of International Commercial Arbitration 103.

\textsuperscript{13} See P. Monnier, 'The Time to Comply with an Adverse WTO Ruling: Promptness within Reason' (2001) 35(5) Journal of World Trade, 825: 'The time period for compliance is the eye in the cyclone of the WTO Dispute Settlement Mechanism ... If the concept of compliance period relies mainly on the "Reasonable Period of Time" set forth in Article 21.3 of the DSU, the concept of "without delay" provided for prohibited subsidy cases should not be forgotten. In both cases, the basic principle is immediate compliance. For example, Article 21.1 of the DSU prescribes that "Prompt compliance
suggested by the member concerned with the DSB's approbation (DSU Article 21.3(a)), or the period of time agreed to by the parties in the forty-five days following the report's adoption (DSU Article 21.3(b)), that is to say a period of time determined by arbitration in the ninety days following the report's adoption (DSU Article 21.3(c)). When the reasonable period of time has been determined by arbitration, the arbitrator should work with the principle that the reasonable period of time for applying the panel's or the Appellate Body's recommendations should not be longer than fifteen months, starting from the date of the adoption of the panel or Appellate Body report. Nevertheless, this duration may be shorter or longer, according to the circumstances of the particular case (DSU Article 21.3(c)). The span between the date at which a panel has been established by the DSB and the date of the reasonable period of time's determination must not be longer than fifteen months, unless the parties to the dispute decide otherwise. In cases where either the panel or the Appellate Body will have extended the time for examining a case, the extra period of time granted will be added to the fifteen months. Nevertheless, unless the parties to the dispute agree that exceptional circumstances exist, the overall period of time must not exceed eighteen months (DSU Article 21.4).

When there is a disagreement about the compatibility of measures taken to conform to the DSB recommendations with a WTO agreement, a party can have recourse to the procedures of the DSU (Article 21.5). If, in the reasonable period of time, the concerned state does not transform the measure found incompatible with a WTO agreement into a conforming one, this state must, if asked to do so, lend itself to negotiations, with a view to finding mutually acceptable compensation (DSU Article 22.2). The complaining state may ask the DSB for the authorization to withhold concessions and other obligations if no other satisfying compensation has been agreed to in the twenty days following the date on which the reasonable time limit has expired. The DSB must grant this authorization within a time-frame of thirty days, starting from the expiry of the reasonable period of time, unless it decides by consensus with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members’ ... But this “zero delay” standard looked probably unrealistic to the negotiators of the WTO agreements who installed safety-valves such as “Reasonable Period of Time” in the DSU or “time-period within which the measure must be withdrawn” in part II of the Agreement on Subsidies and Countervailing Measures (ASCM).
to reject the requirement. The DSU imposes certain limitations to the fields to which countermeasures should apply.\textsuperscript{14}

A second type of arbitration at the WTO comes up at this point. The level of suspension of concessions or other obligations authorized by the DSB must be equivalent to the level of nullification or impairment (DSU Article 22.4). In case of disagreement concerning the equivalence of the level of nullification or impairment with that of countermeasures, an arbitral award may be requested (DSU Article 22 paragraphs 5, 6, and 7). This arbitration will be conducted by the initial panel if its members are available, or by an arbitrator appointed by the Director-General, and it will be completed in the sixty days following the date when the reasonable time limit will have expired. Concessions or other obligations will not be suspended during the arbitration (DSU Article 22.6). During the performance of their task, arbitrators will not examine the nature of concessions, or other obligations, that are the objects of countermeasures, but they will determine whether the level of the requested suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine whether the requested suspension of concessions or other obligations is authorized in accordance with the relevant WTO agreement.\textsuperscript{15}

DSU Article 25 establishes a third type of arbitral award, which may cover the fields of arbitration proceedings foreseen in Articles 21.3(c) and 22.6, or supplement the proceedings of a panel or the Appellate Body to settle the dispute. Thus, it is related to the multilateral surveillance system, although from a systemic perspective.

\textsuperscript{14} The DSU specifies that compensation and countermeasures are only temporary measures, to which one can have recourse if the recommendations and decisions are not applied in a reasonable period of time. To this end, multilateral commercial agreements have been grouped into three distinct agreements: the GATT 1994 (to which other multilateral commercial agreements on goods trade have been added), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The general principle is that the plaintiff party should first seek to withhold concessions or other obligations in the same sector as the one in which an annulment or reduction of advantages has been ascertained. If it is impossible or inefficient to do so in the same sector, withholding concessions or other obligations will be possible in other sectors, invoking the same agreement. If this solution is not possible and circumstances are severe enough, the plaintiff party may seek to withhold concessions or other obligations invoking another WTO Agreement (see DSU Article 22).

The arbitrators' decisions are not subject to adoption by the DSB, contrary to the panels' and the Appellate Body's reports; the DSB simply 'takes note' of their content. In the case of arbitration under DSU Article 25, awards are notified to the DSB. This neither lessens in any way the binding character of arbitral awards, nor their judicial effect of 'autorité de la chose jugée'. This is demonstrated by DSU Article 21.3(c), establishing expressis verbis that the reasonable period of time will be determined through 'binding arbitration'. DSU Article 22.7 – with respect to arbitration under Article 22.6 – stipulates that '[t]he parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration'. Article 25 puts forward the parties' consent to the award, insisting specifically on the fact that '[t]he parties to the proceeding shall agree to abide by the arbitration award'.

Arbitration as a complementary means of dispute settlement

Arbitration under Article 21.3(c) as a 'residual' means of dispute settlement

The meaning of DSU Article 21.3(c) must be elucidated within its context. The latter includes, first, the introductory text to Article 21.3, acknowledging that the issue of a 'reasonable period of time' for enforcement is involved only 'if it is impracticable [for a Member] to comply immediately' with the recommendations and rulings. Secondly, there is DSU Article 21.1, underlining that '[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members'. Thirdly, there is DSU Article 3.3, acknowledging that '[t]he prompt settlement of situations ... is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members'. Thus, the DSU underlines explicitly the importance of prompt conformity.

The arbitrator's warrant in accordance with DSU Article 21.3(c) consists exclusively of determining the 'reasonable period of time' for enactment. It does not enable the arbitrator to propose or determine ways or means to ensure it. Article 21.3(c) aims at ensuring the conformity with, or the application of, a decision made by the DSB.

16 Award of the Arbitrator, Australia – Measures Affecting Importation of Salmon, WT/DS18/9, 23 February 1999, paragraph 35.
The purpose of Article 21 is to render the measure, that is deemed incompatible with the obligations of a state member of the WTO in accordance with specific provisions of a WTO agreement, compatible with these same provisions. DSU Article 3.7 underlines that ‘the first objective of the dispute settlement mechanism is usually to secure the withdrawal of [a measure inconsistent with WTO rules]’. Moreover, the DSU indicates that it is possible to have recourse to compensation only if ‘the immediate withdrawal of the measure is impracticable’, and then solely ‘as a temporary measure pending the withdrawal of the measure which is inconsistent with [a WTO agreement]’. Suspending concessions or other obligations is explicitly designated as a last resort measure, subject to DSB authorization. It also remains a ‘temporary’ corrective measure, authorized in accordance with DSU Article 22.8 only in order to achieve the removal of the non-conforming measure, or the reaching of a ‘mutually satisfactory solution’.

Determination of the reasonable time for applying the DSB recommendations and rulings depends on the factual, juridical, and structural circumstances faced by the state to which the non-conformity or violation of a WTO agreement is imputed.

Arbitration in accordance with DSU Article 21.3(c) aims at setting the reasonable period of time for enacting a panel’s or the Appellate Body’s recommendations. The notion of ‘reasonable’ period of time is not easy to define legally. The Appellate Body, in *US – Hot-rolled Steel*, attempted to draw a definition for ‘reasonable’ within the context of the Anti-dumping Agreement. The Appellate Body indicated that the term ‘reasonable’:

implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is ‘reasonable’ in one set of circumstances may prove to be less than ‘reasonable’ in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time … should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation … In sum, a ‘reasonable period’ must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of ‘reasonableness’, and in a manner that allows for account to be taken of the particular circumstances of each case.17

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In the absence of a mutually agreed solution, the primary objective is usually the immediate withdrawal of the measure deemed incompatible with one of the WTO agreements. Indeed, DSU Article 21.1 states the general principle according to which ‘[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members’. This obligation is specified in DSU Article 21.3, which provides that ‘if it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so’. WTO member states must thus seek to conform ‘immediately’ to the DSB recommendations and rulings. The state concerned has the right to a reasonable period of time for implementation only if it is materially impossible for it to proceed to immediate withdrawal. Thus, having recourse to the reasonable period of time is a second best solution.

In determining the reasonable period of time, the arbitrator must work on the principle that this time should not exceed fifteen months beginning from the date of adoption of the panel’s and/or Appellate Body’s report. The reasonable period of time may be shorter or longer, depending on the circumstances. It is clear from the text of DSU Article 21.3(c) that the fifteen months’ time-frame, introduced as a basic principle, is merely an indication. As it has been said in Australia – Salmon, it does not mean ‘that the arbitrator is obliged 10 grant fifteen months in all cases’. Article 21.3(c) clearly leaves the possibility open to settle on a period lesser or greater than fifteen months for applying the DSB recommendations and rulings.

Determining the reasonable period of time for implementation may also be dependent on a state’s specific situation. Arbitration rulings have kept in mind the fact that DSU Article 21.2 ‘usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB’. In Argentina – Hides and Leather, Argentina had considered that its economic interests as a developing country and its financial solvency with the IMF were at stake.

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from the arbitrators that they take into account its 'interest' in benefiting from a longer period of time allowing it progressively to enforce DSB recommendations and rulings. The arbitrator acknowledged that by virtue of DSU Article 21.2, together with Article 21.3(c), he could take into account, in an appropriate way, the circumstances surrounding a developing country member of the WTO facing severe economic and financial problems and having to conform to DSB recommendations and rulings. In the arbitration concerning Chile – Alcoholic Beverages, it has been said that, 'although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded'. In Indonesia – Autos, the arbitrator took into account, as 'particular circumstances', Indonesia's status as a developing country and the fact that the country was then 'in a dire economic and financial situation' and that its economy was 'near collapse'. The arbitrator thus granted substantial additional time to the 'normal' necessary time to achieve the internal process for elaborating the domestic regulation. A point to be noted is that the arbitrator's assessment of a situation is enshrined in the limits of his or her jurisdiction.

Arbitration under Article 21.3(c) does not allow the arbitrator to modify the conclusions of a panel or of the Appellate Body. This principle was recalled in Australia – Salmon. In other words, when a state is in the situation of violating a WTO agreement, and this situation has been qualified as such by a panel and/or the Appellate Body, the relevant state cannot take advantage of it to obtain a longer reasonable period of time. This is an application of the maxim 'no one can profit from his or her own turpitude' (nemo suam turpitudinem allegans auditur) within the context of Article 21.3(c). Good faith remains an important principle in the evaluation of the notion of 'reasonable period of time'. Australia – Salmon provides an illustration of this principle. In this case, the Appellate Body had concluded unequivocally that the measure at issue was a prohibition against the importation of fresh, chilled, or frozen Canadian salmon. It also noticed unequivocally that this prohibition against importation was incompatible with Articles 5:1, 2:2, 5:5 and 2:3 of the Agreement on the Application of Sanitary and Phytosanitary Measures ('the SPS Agreement'). Hence, it was naturally difficult for the arbitrator to accept the opinion according to which, to

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22 Award of the Arbitrator, Australia – Salmon, paragraph 34.
determine the reasonable period of time, it should be necessary to take into account the time needed to conduct risk assessments in order to demonstrate the compatibility of the prohibition against importation, as the prohibition had already been found to be incompatible with the provisions of the SPS Agreement.\textsuperscript{23}

This leads to the conclusion that there is an underlying 'subordination' of an Article 21.3(c) arbitration to the panel and the Appellate Body. The arbitrator comes across as the 'executive arm' of a panel or of the Appellate Body, endowed with the capacity to act so that the rulings and recommendations can be enforced as quickly as possible in order to correct commercial damage. It is within this context that arbitrators have insisted on specifying that the suggestion of ways and means to ensure enforcement is not part of their mandate. The choice of the means of enforcement remains the prerogative of the concerned state. As the arbitrator said in EC – Hormones: 'An implementing Member, therefore, has a measure of discretion in choosing the means of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the [WTO] Agreements.'\textsuperscript{24}

\textbf{Arbitration under Article 22.6}

DSU Article 21.5 on 'Implementation of Recommendations and Rulings' (panel and Appellate Body) and Article 22.6 ('Arbitration') may be entangled. Brazil – Aircraft is illustrative here again. Brazil had appealed to the Appellate Body with respect to certain observations made by the Article 21.5 panel at the same time that it requested arbitration under DSU Article 22.6. For the arbitrators, the Appellate Body's ruling could have had an effect on the measure, such that Brazil could have been considered as having put its legislation in conformity with its WTO obligations. The proper functioning of the proceedings demanded that the parties be able to formulate observations on the content of the Appellate Body's report.\textsuperscript{25} As a consequence, the arbitrators adopted a calendar that, in their opinion, respected the gist of both

\textsuperscript{23} Ibid.

\textsuperscript{24} Award of the Arbitrator, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/15, 29 May 1998, paragraph 38.

\textsuperscript{25} In this aspect, the arbitrators agreed with the arbitrators' declaration in EC – Bananas III (US) (Article 22.6 – EC), paragraph 2.12: 'given that our own decisions cannot be appealed, we considered it imperative to achieve the greatest degree of clarity possible with a view to avoiding future disagreements between the parties. Reaching this
DSU Articles 21 and 22 and the aim of arbitration in accordance with DSU Article 22.6, without illegally delaying the ruling’s publication. In this specific case, the arbitrators established a calendar planning for the Appellate Body report’s publication. One should note at this point the existence of a sort of hierarchy between arbitrations and Article 21.5 proceedings, that is, proceedings requiring a panel and the Appellate Body.

It is interesting to notice that DSU Article 22.6 allows arbitrators to develop their own procedures. For instance, third parties’ rights to intervene have been recognized in the arbitration proceedings under Article 22.6 pertaining to EC – Hormones, then rejected in EC – Bananas III (US) (Article 22.6 – EC). In the ruling on EC – Hormones, the arbitrators considered that the DSU provisions pertaining to panel proceedings, which are referred to by way of analogy in the arbitrators’ work proceedings, endowed arbitrators with the discretionary power to decide on procedural issues remaining not covered by the DSU (Article 12.1). Given the fact that the DSU does not deal with the

objective required the parties to have more time to submit to us the information necessary for us to complete our tasks’.

26 See Brazil – Aircraft (Article 22.6 – Brazil), paragraphs 3.4 and 3.5. See also Award of the Arbitrator, EC – Hormones (US) (Article 22.6 – EC), paragraph 12. Arbitrators sometimes go to the extreme, comparing for instance their warrant with that of the panels: “There is, however, a difference between our task here and the task given to a panel. In the event we decide that the US proposal is not WTO consistent, i.e. that the suggested amount is too high, we should not end our examination the way panels do, namely by requesting the DSB to recommend that the measure be brought into conformity with WTO obligations. Following the approach of the arbitrators in the Bananas case – where the proposed amount of US$520 million was reduced to US$191.4 million – we would be called upon to go further. In pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would have to estimate the level of suspension we consider to be equivalent to the impairment suffered. This is the essential task and responsibility conferred on the arbitrators in order to settle the dispute. In our view, such approach is implicitly called for in Article 22.7.” Ibid. See P. Monnier about this question, ‘Working Procedures before Panels: The Appellate Body and Other Adjudicating Bodies of the WTO’ (2002) 1(3) Law and Practice of International Courts and Tribunals 514.

27 Award of the Arbitrator, Brazil – Aircraft, paragraph 7.
28 Award of the Arbitrator, EC – Bananas III (US) (Article 22.6 – EC), paragraph 2.8.
29 About this, see the note at Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, 13 February 1998, n. 138, ‘the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel’s ruling on matters of procedure must demonstrate the prejudice generated by such regal ruling’.
issue of the participation of third parties in arbitration proceedings, arbitrators are thus responsible for granting or refusing this prerogative.

Nevertheless, arbitrators sometimes practise self-limitation of their powers. For instance, they have generally deemed that DSU Article 6.2 applies de lege ferenda to the arbitration procedure of Article 22.6. According to the well-established practice concerning dispute settlement under Article 6.2, panels and the Appellate Body have systematically ruled that a measure questioned by a complainant cannot be considered as included in a panel’s remit if it is not clearly identified in the request for establishment of the panel. In disputes concerning Article 6.2, in which a plaintiff party was intent on maintaining the possibility of later completing the initial list of measures included in the request for the panel’s establishment (for instance, by using the phrase ‘including, but not exclusively, the listed measures’), it has been held that the panel’s remit was limited to the specifically identified measures. Thus, the scope of the arbitrators’ powers under Article 22.6 is limited to the sector(s) and/or to the agreement(s) for which suspension is specifically requested to the DSB.

It is relevant to point out that the DSU itself remains vague about certain aspects of arbitrators’ scope of powers deriving from Article 22.6. DSU Article 22.7 enables arbitrators to examine the allegations concerning the principles and procedures stated in Article 22.3 in its entirety, while Article 22.6 seems to limit the arbitrators’ ability if a request to allow the suspension of concessions is presented in virtue of Article 22.3(b) or (c). At this point, the arbitrators have stated that there is no

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32 Refer particularly to DSU Article 22.3(a), (b), and (c): ‘In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures: (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment; (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations...’
contradiction between paragraphs 6 and 7 of Article 22, and that these provisions can be read harmoniously together. For the arbitrators, the fundamental raison d'être of these provisions is to ensure that the suspension of concessions or other obligations between sectors or agreements (excluding those sectors or agreements for which a panel or the Appellate Body has notified violations) remains an exception and does not become the rule. For DSU Article 22.3 to be fully implemented, the arbitrators' power to examine on demand whether the principles or procedures in paragraphs (b) and (c) have been followed implies that the arbitrators have the competence to examine whether a requirement presented in virtue of paragraph (a) should have been made, wholly or partly, according to paragraphs (b) or (c). If the arbitrators were deprived of this implicit power, principles and procedures contained in Article 22.3 could easily be bent. Indeed, if there was no sort of test whatsoever for authorization requirements to suspend concessions presented in virtue of paragraph (a), members could be tempted to invoke this paragraph always so as to skip the multilateral surveillance system to which the intersector suspension of concessions or other obligations is submitted, and the rules in other paragraphs of Article 22.3 could simply become obsolete.33

Arbitration as an 'alternative' and 'autonomous' means of dispute settlement at the WTO

Arbitration appears in the DSU as an 'expeditious' procedure and 'as an alternative means of dispute settlement'.34 Until now, only in one

with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement; (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement'.

33 Appellate Body Report, EC – Bananas III (US) (Article 22.6 – EC), paragraphs 3.5 and 3.7.

34 Article 25 states that: '1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties. 2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process. 3. Other Members may become party to an arbitration proceeding only upon the
instance, *US – Section 110(5) Copyright Act* (Article 25.3),\(^{35}\) was an arbitration procedure based on DSU Article 25 put in place. Moreover, it was the first case in which a WTO dispute settlement body was required to determine the level of nullification or impairment following a failure to comply with obligations deriving from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).\(^ {36}\) It is also noteworthy that this arbitration presented great resemblance in its object with an arbitration to be led under DSU Article 22.6.

**The arbitrator as the judge of the ‘competence of the competence’**

The only recourse to arbitration under DSU Article 25\(^ {37}\) naturally raised the question of the arbitrators’ competence. Whereas the DSB establishes panels or directs issues towards arbitration bodies, Article 25 sets a different procedure. Parties to a dispute can choose to resort to arbitration and must solely notify to the DSB their decision to have recourse to arbitration. No decision from the DSB is necessary for a question that must be submitted to an Article 25 arbitration. In the absence of multilateral and institutional control over the procedure, the arbitrators themselves have to ensure that it is applied in conformity with the rules and procedures of the WTO dispute settlement system.\(^ {38}\) As reminded by the Appellate Body in *US – 1916 Act*,\(^ {39}\) there exists a widely accepted rule according to which an international court has the competence to examine the question of its own competence.\(^ {40}\)

agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto. 4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.'

\(^ {35}\) *US – Section 110(5) Copyright Act* (Article 25.3).

\(^ {36}\) The lessons to draw from practice are thus inscribed within a limited frame.

\(^ {37}\) The arbitrators were reminded that arbitration was rarely used within the framework of the GATT 1947.

\(^ {38}\) In particular, the arbitrators have deemed that the arbitration procedure at stake should not be enacted so as to distort the provisions in DSU Article 22.6.


\(^ {40}\) This point of view is corroborated by Article 21 of the Optional Rules for Arbitration Involving International Organizations and States. See Permanent Court of Arbitration, Optional Rules for Arbitration Involving International Organizations and States, effective 1 July 1996, The Hague, Netherlands.
In *US – Section 110(5) Copyright Act (Article 25.3)*, the arbitrators deemed that this principle also applies to arbitration courts. They insisted on pointing out the reasons why they deemed it necessary to take cognizance of the dispute presented to them. The arbitration proceedings had been initiated to examine a specific question resulting from the enactment of the decisions and recommendations adopted by the DSB on the basis of the panel report in *US – Section 110(5) Copyright Act*. The arbitrators’ remit was to determine the level of annulment or reduction of advantages for the European Community resulting from the provisions in Article 110(5) (B) in the USA’s law on copyright.

DSU Article 25.2 states that recourse to arbitration is subordinated to parties’ mutual agreement on procedures to be undertaken, except for a contrary provision of the DSU. Article 25 does not specify that having recourse to arbitration is excluded when the issue is to determine the level of nullification or impairment undergone by a member state of the WTO. On the contrary, the terms of Article 25.1, referring to ‘the solution of certain disputes that concern issues that are clearly defined by both parties’, may allow one to think that Article 25 should be interpreted as an arbitration mechanism to which member states of the WTO may have recourse every time they deem it necessary. Moreover, it is relevant to note that DSU Article 22.2 mentions the ‘negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation’. According to the arbitrators in the above-mentioned dispute, nothing in the wording of this provision seems to forbid considering arbitration as a means for achieving a mutually acceptable compensation.

In addition, the nature of arbitration allows it to contribute to the swift settlement of a dispute between WTO member states, as required in DSU Article 3.2. Indeed, it may facilitate the resolution of a dispute in the context of a negotiation of compensation, thus opening the way for implementation, while avoiding the suspension of concessions or other obligations. In the arbitrators’ logic:

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41 See P. Monnier, ‘Working Procedures before Panels, the Appellate Body and Other Adjudicating Bodies of the WTO’ (2002) 1(3) *Law and Practice of International Courts and Tribunals* 512. According to the author, ‘Arbitration is probably the most diplomatic procedure among WTO adjudicating bodies since it was designed as “an alternative means of dispute settlement”’.

In general, recourse to arbitration under Article 25 strengthens the dispute resolution system by complementing negotiation under Article 22.2. The possibility for the parties to a dispute to seek arbitration in relation to the negotiation of compensation operates to increase the effectiveness of that option under Article 22.2. Incidentally ... compensation, is always to be preferred to countermeasures of any sort, since it enhances trade instead of restricting or diverting it ... such an application of Article 25 does not, at least in the case at hand, affect the rights of other Members under the DSU.43

Considering the object of arbitration requested by parties, and the fact that other states' rights within the framework of the DSU should not be affected by the USA's and European Communities' decision to have recourse to arbitration according to Article 25, the arbitrators thought that while waiting for an ulcerior interpretation provided by the member states of the WTO, they had to declare themselves able to determine the level of the European Communities' advantages that were nullified or impaired.44

Arbitration under Article 25: an autonomous ‘means’ of dispute settlement and an autonomous ‘procedure’ in the DSU?

The DSU remains vague on the issue of the autonomy of arbitration under Article 25. First, it is stipulated that an agreement on the recourse to arbitration will be notified to all WTO member states quite a long time before the effective starting of the arbitration proceedings. Does this mean that member states could question the arbitration agreement's validity? Could this agreement be annulled or declared in non-conformity if it were to include provisions contrary to the WTO agreements? At this level, what is the role of the multilateral surveillance system? Moreover, one is entitled to wonder whether procedures provided for in an arbitration

43 Ibid., paragraph 2.6.
44 It is interesting to note the arbitrators' 'profession of faith' in this case (Ibid., see footnote 30): 'The Arbitrators' recognition of their jurisdiction in this case is not a unilateral extension of WTO jurisdiction, since it is dependent on the agreement of the parties to a dispute to have recourse to Article 25 of the DSU. This decision is without prejudice to the DSU compatibility of the decision of the parties to accept this award as the level of nullification or impairment for the purpose of any further proceedings under Article 22 of the DSU in relation to this case. It is also without prejudice to any interpretation of the provisions of Articles 22 and 25 of the DSU by the Ministerial Conference or the General Council.'
agreement are *lato sensu* ‘additional or special procedures’ covered by the terms of DSU Article 1.2. In *Guatemala – Cement I*, the Appellate Body asserted that the special or additional rules and procedures of DSU Article 1.2 fitted together with the generally applicable rules and procedures of the DSU to form ‘a comprehensive, integrated dispute settlement system’. These special or additional rules and procedures will prevail over the provisions of the DSU to the extent that there is a difference between the two sets of provisions. If there is no difference, the rules and proceedings of the DSU apply jointly to the special or additional provisions of the WTO agreement. It should be noted that a special or additional rule or procedure prevails over a DSU provision when application of the former implies the latter’s violation, i.e., in case of conflict between the two provisions.

Thus, it seems that, according to DSU Article 1.2, the procedures to be followed in an arbitration under Article 25 – set by a mutual agreement between the parties to a dispute – are not ‘additional or special procedures’ that could prevail, and *a fortiori* depart from, the procedures set by the DSU. Indeed, Article 1.2 lays down a restrictive list of the WTO agreements containing these ‘additional or special’ procedures. Arbitration agreements – which are not ‘covered agreements’ as defined by the DSU – are not mentioned in it. What is more, DSU Article 25.2 creates the possibility for the parties to agree on procedures to follow ‘except as otherwise provided in the DSU’. Hence, it would be difficult to

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45 ‘The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the “DSB”), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principles that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.’


confer a *lex specialis* status on arbitration agreements, effectively severing them from the DSU and its rules and procedures.

Article 25 merely provides that the arbitration award will be ‘notified’ to the DSB and to the Council or Committee of any relevant agreement. Contrary to the panel’s and the Appellate Body’s reports, the arbitration award rendered in virtue of Article 25 does not require an adoption procedure by the DSB. An original aspect must be noticed: the arbitration report must be notified to a Council or Committee of any relevant agreement. For instance, it will be notified to the TRIPS Council if the award concerned issues related to the TRIPS.

*Prima facie*, the parties to the arbitration procedure must ‘agree’ to conform to the award. Article 25 does not set specific procedures and substantial rules to warrant the respect of the award. Nevertheless, it provides that DSU Articles 21 and 22 will apply *mutatis mutandis* to the awards.\(^{49}\) This is a token of effective implementation of the arbitral awards delivered according to DSU Article 25 as they may benefit from the multilateral surveillance system machinery. However, it can be seen also as an indication that the negotiators wanted to privilege dispute settlement through panels and the Appellate Body, rather than by an ad hoc arbitration procedure, since the enactment of the ruling issued by an arbitration procedure under Article 25 is rooted in the general procedure of dispute settlement.

Last, the enigma of the relevant law to be applied within the framework of DSU Article 25 needs to be addressed. Is it possible to conceive that states parties to an arbitration procedure could decide by a common agreement to determine the applicable law to their dispute outside of the WTO agreements? This hypothesis is probably unsustainable. DSU Article 3.2 underlines *expressis verbis* that:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and

\(^{49}\) See V. Hughes who considers that ‘the words “*mutatis mutandis*” suggest that an arbitration award duly notified pursuant to Article 25.3 would be equivalent of the recommendations and rulings referred to in Articles 21 and 22’, Hughes, ‘Arbitration within the WTO.’
rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Although this provision *a priori* addresses the WTO dispute settlement bodies, it seems to imply *in extenso* that the states parties to a WTO dispute are limited in their choice of the applicable law. Where states derogate from the 'WTO law' in an arbitration agreement, it would be quite plausible that the arbitrator(s) should decide to determine the legality of the agreement setting their powers in the light of the DSU. In this area, however, practice at the WTO does not yet exist.

**Conclusion**

Although the WTO Agreement provides 'for a multitude of dispute settlement procedures', one cannot but note that the so-called 'mainstream procedures', i.e., consultations, the possibility of establishing a panel, and recourse to the Appellate Body, play a key role in practice for resolving disputes. Arbitration is foreseen in different ways in the DSU, one of them being arbitration as an alternative means of dispute settlement. It is hoped that in the future the latter contributes more forcefully to preventing and avoiding trade disputes.

A careful analysis of the arbitration procedures in the WTO reveals that alternative dispute settlement procedures such as arbitration cannot be considered as fully autonomous within the WTO. They are enshrined in the DSU and must conform to certain principles and rules. Some arbitration procedures have been heavily moulded against this background. The procedure stemming from DSU Article 25 has been granted more autonomy (one can think of the freedom of the parties to choose the arbitrators and to some extent, the procedural rules), but draws many of its 'lettres de noblesse' from the DSU.

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50 Feliciano and Van den Bossche, 'Dispute Settlement System', p. 304.