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CHAPTER 5

CLARIFICATIONS OF THE DSU BROUGHT BY WTO JURISPRUDENCE

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I. INTRODUCTION

The dispute settlement system of the WTO is generally considered to be one of the cornerstones of the multilateral trade order. Because the GATT dispute settlement mechanism generally functioned well and was trusted by the Contracting Parties, negotiations were undertaken to increase its judicial character and its automatic mechanism, and to expand its reach and power. The results of these negotiations are reflected in the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU"), effective since 1 January 1995.

Improvements to the GATT system brought about by the DSU include more automatic decision-making in the establishment,\(^1\) terms of reference\(^2\) and composition of panels,\(^3\) in the adoption of reports of the panels and the new Appellate Body,\(^4\) and in authorisation of retaliatory measures.\(^5\) Moreover, the DSU establishes an integrated system that permits WTO Members to base their complaints on any "covered agreements" or combination of agreements.\(^6\) New rules regulate the surveillance of implementation, the possibility of compensation, and the right to specific retaliatory actions including cross-retaliation.\(^7\) To this end, a Dispute Settlement Body (DSB)\(^8\) exercises the authority of the General Council and the councils and committees of the covered agreements in administering the DSU.

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1. Article 6.1 DSU.
2. Articles 8 and 8.7 DSU.
3. Articles 6.7 and 8 DSU.
4. Articles 16.4 and 17.14 DSU.
5. Articles 22 and 21.5 DSU.
6. "Covered agreements" is defined in Annex 1 of the DSU as including all multilateral trade agreements of Annex 1A (including the GATT 1994), B and C, Annex 2 of the WTO Agreement and the Agreement Establishing the WTO.
7. Articles 21 and 22 of the DSU.
8. Article 2 DSU.
The dispute settlement system of the WTO is quasi-judicial. Independent and autonomous bodies are responsible for adjudication of disputes. The system is binding and based on the rule of law. WTO Members have bound themselves to the outcomes of Panel and Appellate Body Reports and the DSB is to authorise sanctions in case of non-compliance. The system is exclusive and mandatory. WTO-related disputes can only be dealt with before WTO adjudication bodies, and once triggered, the process can only be stopped with the consent of all parties to the dispute. However, notwithstanding their significant power, WTO adjudication bodies can only "interpret" the provisions of WTO agreements and are explicitly prohibited from adding to or diminishing the rights and obligations of Members when assessing the WTO compatibility of the measures challenged. Nonetheless, WTO Members have vigorously complained in DSB meetings that the Appellate Body "made law". For example, when in US - Shrimps it interpreted the word "seek" in Article 13 DSU to mean "receive" and when in Canada - Aircraft, it interpreted the word "should" also with reference to the same article DSU to mean "shall".

This new integrated dispute settlement mechanism applies to all covered agreements. Article 19 of the Agreement on Agriculture (AoA) provides that the DSU shall apply to consultations and settlement of disputes arising under that Agreement. To date, violations of provisions of the AoA have been invoked in at least 29 requests for consultations. Five Panel and Appellate Body reports have interpreted provisions of the AoA. Other disputes have involved the application of various WTO agreements to agricultural products. All of these disputes are regulated by the DSU.

9 Article 3.2 DSU.
10 See DSB Minutes WT/DS6/M/50, p. 6.
11 See DSB Minutes WT/DS6/M/67, p. 4.
13 As of January 2000, the provisions of Agreement on Agriculture litigated are as follows: Articles 3 (DS103 & 113/AB/R, DS108/R); 4 (DS27/AB/R, DS69/R, DS90/R); 5 (DS69/AB/R); 8 (DS103 & 113/AE/R, DS108/R); 9 (DS103 & 113/AB/R,
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The jurisprudence on the interpretation of the DSU is therefore of direct relevance to all disputes involving agricultural products or the Agreement on Agriculture.

The Annex to this chapter describes the process of the dispute settlement in the WTO. The functioning of the WTO dispute settlement system has already been described by many authors. We shall therefore attempt to avoid repetitions, and rather focus on some particular issues or problems that have come to light in WTO jurisprudence over the first six years of DSB/DSU practice.

II. VARIOUS DSU ISSUES

A. Interpretation of the WTO Agreements

1. Prohibition against clinical isolation

Panels and the Appellate Body must respect rules of international law when interpreting WTO provisions. This requirement was affirmed in the US - Gasoline case: "[The] GATT is not to be read in clinical isolation from public international law." Early on, the Appellate Body stated that certain general principles of international law, such as good faith, due process, rules on the burden of proof and the rights to adequate representation before WTO panels and the Appellate Body, to which no explicit reference is made in the DSU or the WTO Agreement, are applicable to DSU disputes and are to be taken into account when interpreting WTO provisions.

(cont footnote 13) DS108/R; 10(DS103 & 113/R, DS108/R); 13 (DS22/R). The following products in the following proportion have been the object of litigation: animal products (16.8%); vegetables (11.2%); prepared foodstuffs (6.4%); other agricultural (3.2%). In total, 37.6% of all products litigated through January 2000. See Park, Y.D. & Eggers, B. "WTO Dispute Settlement 1995-1999: A Statistical Analysis" (2000) 3 JIEL 193, p. 198.


16 See Panel Report on Korea - Measures Affecting Government Procurement, WT/DS163/R: "Customary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it." Para. 7.96.
2. GATT practices

Additionally, the DSU provides that GATT practices are to be maintained to the extent that they are not otherwise reflected or amended by the DSU. The first of the General Provisions of the DSU is categorical. Article 3.1 DSU provides:

Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

This general principle of interpretation of the WTO agreements is reflected also in Article XVI:1 of the Agreement Establishing the WTO. But identifying which practices are to be maintained and which ones are set aside by the DSU or other rules of international law is not always evident. One example of a GATT practice that was set aside by the Appellate Body concerns the participation of private lawyers under the DSU process as discussed in EC – Bananas III. The Panel had decided that the former GATT practice of excluding the participation of private lawyers in the confidential panel process was to be continued in the context of the WTO disputes. The Appellate Body overruled the panel, finding this GATT practice to be contrary to general practice in international courts and tribunals. Though there is no express provision in the DSU, the Appellate Body concluded that it was for each WTO Member to choose its representative.

3. Customary rules of interpretation of public international law

Article 3.2 DSU mandates the application of principles of interpretation of public international law in the determination of the WTO rights and obligations of parties to a dispute. The question, however, is what are those customary rules of interpretation of public international law that Panels and the Appellate Body are required by Article 3.2 to use in the interpretation of provisions of the WTO agreements?

17 Article XVI:1 of the Agreement Establishing the WTO: "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."

18 Above n. 12, para. 12.
In US - Gasoline, the Appellate Body stated that "customary rules of interpretation" include Article 31 of the Vienna Convention on the Interpretation of Treaties, which "has attained the status of a rule of customary or general international law". The important focus on the "ordinary meaning of the terms" used in the WTO agreements, and the frequent reliance on the Oxford English Dictionary to aid in the definition of such terms, aims at achieving an objective interpretation. In subsequent cases the Appellate Body confirmed that Articles 31 and 32 of the Vienna Convention are relevant when interpreting the WTO agreements. It is not clear which other provisions of the Vienna Convention might be considered customary rules of interpretation of public international law, but the Vienna Convention's own provisions (Article 31.3(c)) require that an international tribunal take into account all other rules of international law in the interpretation of treaties. This would include many customs, general principles of law, and in certain circumstances, treaties, including other provisions of the same Vienna Convention. For instance, the Appellate Body in Brazil - Desiccated Coconut, and the Panel in EC - Hormones referred to Article 28 of the Vienna Convention, which deals with the retroactive application of treaties. In EC - Poultry, the Appellate Body declined to rely on Article 30 dealing with successive application of treaties. However, in the EC - Hormones Arbitration Report regarding the interpretation of Article 22.7 DSU, the arbitrators made use of Article 30 of the Vienna Convention on the successive application of treaties.

19 Above n. 15, p. 17.
20 Article 31.1 of the Vienna Convention reads: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
24 Above n. 12, para. 79.
addition to provisions contained in the Vienna Convention, the Panels and the Appellate Body have also referred to some general principles of interpretation such as the principle of effective interpretation, the presumption against conflicts between treaties and treaty provisions, or the interpretative principle of in dubio mitius.

4. The use of other rules of international law

A related issue is the difference in treatment of outside sources of law and information by the panels and Appellate Body in the interpretation of WTO provisions compared with that accorded under the GATT. Panels and the Appellate Body are required to examine outside sources of law where such sources are expressly referred to in the text of the WTO Agreements for definition or delimitation of a WTO obligation, or where non-WTO provisions relating to international standards bodies and norms are referred to in other agreements such as in the TBT, the SPS, the SCM or the GATS. International norms and standards referred to in the TBT, the SPS Agreements or the GATS are to be used by Members as a “basis” for their own domestic norms and measures. These international standards are not applied or enforced by WTO adjudicating bodies but are only used to assess the reasonableness of the domestic norms.

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24 Above n. 12, para. 79.
26 See, US - Gasoline, above n. 15, p. 18: “An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”; see also Japan - Alcoholic Beverages, above n. 21, p. 12; Appellate Body Report on United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear, WT/DS24/AB/R, adopted 25 February 1997, (“US - Underwear”) p. 16; Canada - Milk, above n. 12, para 131; EC-Certain Computer Equipment, above n. 21, p. 84.
28 Appellate Body Report on EC- Hormones, above n. 23, para. 154. “The principle of in dubio mitius applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.”
30 Article 3.2 of the SPS Agreement; Article 2.4 of the TBT Agreement; Para. K of Annex I of the SCM Agreement; and Article VI:5(b) GATS.
32 Note however, in the case of the TRIPs Agreement, the outside norms (the various intellectual property treaties referred to in the TRIPs Agreement) are enforced by WTO adjudicating bodies as WTO obligations, as provisions of TRIPS. For instance, Article 2.1 of the TRIPs states: “Members shall comply with Articles 1 through 12 of the Paris Convention.” This is so because the TRIPs Agreement explicitly provides so.
In a number of situations, panels and the Appellate Body must refer to other rules of international law to assist them when interpreting and applying the WTO agreements. In EC - Bananas III, the Appellate Body upheld the panel’s statement that it “had no alternative but to examine the provisions” of a non-WTO agreement “in so far as it is necessary” to interpret the WTO rules (the Lomé waiver referred to the Lomé Convention). In EC - Poultry, the Appellate Body concluded that the bilateral agreement between the EC and Brazil could be examined when interpreting the provisions of the EC Schedule. The Panel in Korea - Beef examined the 1989 Panel reports from previous disputes between the same parties, as well as the GA TT Committee on Balance-of-Payments reports, and various bilateral agreements between Korea and the disputing parties. Such legal instruments were examined, not with a view to “enforcing” the content of these bilateral agreements, but strictly for the purpose of interpreting an ambiguous WTO provision, i.e. Note 6(e) to Part IV of Korea’s Schedule.

In EC - Computer Equipment, reference was made to the practice of one state to interpret a provision of a Member’s schedule. In US - Shrimp, in order to interpret provisions of Article XX, reference was made even to treaties not yet ratified by the parties to the dispute. In India - Patent, the Appellate Body said in certain circumstances, it was permissible to refer to national law:

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33 Above n. 12, para. 162: “since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.”

34 Above n. 12, para. 83: “Therefore, in our view, the Oilseeds Agreement may serve as a supplementary means of interpretation of Schedule LXXX pursuant to Article 32 of the Vienna Convention, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat.”

35 Above n. 12, paras 539 ff.

36 However, in EC - Computer Equipment, above n. 21, it was stated: “93 ... The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties”. (Emphasis added.)

37 In US - Shrimp, above n. 21, the Appellate Body used a variety of non-WTO international rules to interpret WTO provisions. It examined the use of the term “natural resources” in a number of international conventions (paras. 127-134). It referred to other international conventions when assessing the meaning of sustainable development referred to in the Preamble of the WTO Agreement (para. 154). It referred to international (and regional) treaties when assessing whether the US measure had been applied in unjustifiable discrimination, in particular with reference to the way consultations had been conducted and ought to be conducted under other international convention (paras. 166-177).

38 Above n. 21, paras. 67-8.
There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, ... in this case, the Panel was not interpreting Indian law “as such”; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPS Agreement. (Emphasis added.)

In *United States – Anti-Dumping Act of 1916*, the panel stated that even if the text of the law in question were clear on its face, it was necessary to examine the domestic application of that law, its historical context and legislative history and subsequent declarations of US authorities in order to assess its compatibility with WTO law.\(^{39}\)

5. Evolutive interpretation

Reference has also been made in WTO jurisprudence to the principle of evolutive interpretation, which is nothing but a reference to the “inter-temporal law doctrine”. In *US – Shrimp* the Appellate Body stated:\(^{40}\)

> From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather “by definition, evolutionary”.

The ordinary meaning of a treaty’s terms should reveal the parties’ common intent at the time the treaty is concluded. However, provision is made in Article 31(3) of the Vienna Convention for consideration of events subsequent to the conclusion of a treaty as authentic elements of interpretation. Paragraph 3(a) refers to any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, while paragraph 3(b) of Article 31 refers to any subsequent practice which constitutes the agreement of the parties regarding its interpretation. Some authors also recognise that good faith interpretation may sometimes require the use of the evolutive interpretation. Sinclair, in the context of Article 31.3(c), stated that:\(^{41}\)

> there is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be

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\(^{40}\) Above n. 21, para. 130.

given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as 'public policy' or 'the protection of morals'.

The ICJ has also made use of an "evolutionary" approach in certain cases, including most recently in the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) where it stated: "[The] Treaty is not static, and is open to adapt to emerging norms of international law."

The main criticism is that in the context of the US- Shrimp case, there was no need to refer to such doctrine as many GATT panel reports had already recognised that tuna, salmon or clean air constituted natural resources.

Plasai also criticised the Appellate Body's lack of legal rigour in the application of the rules on inter-temporal law doctrine in the context of treaty interpretation.

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43 In the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 25 September 1997, the ICJ was asked to assess the state responsibility of Hungary following its termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 for ecological damage (state of ecological necessity) which would have resulted from this system. Referring to provisions of that treaty the ICJ stated: "By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan." Judge Abjunoin, in his separate opinion, advised a cautious approach to the use of evolutive interpretation within the application of Article 31 of the Vienna Convention and in the principle of *pact sunt servanda*.


45 For an excellent discussion of the Inter-temporal international law doctrine, see the paper by Virachai Plasai, Delegation of Thailand, 26 September 2001. Plasai summarized the rule of the inter-temporal law doctrine as being two-fold: "First element, a juridical fact (and act creative of right) must be appreciated in the light of the law contemporaneous with it; Second element, a right validly acquired by the law contemporaneous with its creation may lose its validity if not maintained in accordance with the changes brought about by the development of international law."
B. Consultations

1. Quality and efficacy of consultations

Article 4.3 DSU emphasises the importance of consultations in securing positive dispute resolution, requiring a Member to enter into consultations within 30 days at the request of another Member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. In certain cases where consultations are refused, the complaining party may move directly to request a panel.

In practice, a panel can be established only 71 days after the request for consultations is received by the defendant, because ten days' notice is generally required for a matter to be placed on the DSB agenda and for a meeting to be convened. Article 3 DSU, entitled "Consultations", provides: "Members affirm their resolve to strengthen and improve the effectiveness of consultations procedures employed by Members." To date, more than 200 complaints have been notified to the WTO encompassing more than 160 distinct matters. Of these requests for consultations, 36 disputes have been formally settled (27 of these by the adoption of Appellate Body reports, the others with the adoption of Panel reports), and 32 cases are reported in the press as settled or otherwise inactive for more than 18 months.

Some do question the efficacy of DSU consultations. The draft DSU review proposal suggests reducing the consultation period to 30 days with a view to accelerating the panel process within the DSU. Reducing the period during which consultations are to take place should not affect their quality as the actual meetings usually last less than one day. Members may also consider expanding the use of the alternative dispute settlement mechanisms such as mediation, conciliation or arbitration with experts within the time limit of the mandatory consultation process: the presence of a third party may in fact facilitate the settlement of a dispute.

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46 See, e.g., Article 8.1 of the Agreement on Textiles.
47 Chapter I Rule 2 of Rules of Procedure for Meetings of the General Council, WT/L/161, adopted also by the DSB, WT/DSB/M/1, para. 1.
48 Note that the word "employed" seems to refer to practices of GATT contracting parties.
49 WT/MIN(99)/8, para. 9.
50 At all times during the panel process, the parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation (Art. 5) and arbitration (Art. 25).
Consultations are strictly confidential and do not involve the Secretariat in any manner. They are reported usually to take place in Geneva and generally to be rather brief. There is no control over the quality or sincerity of the consultation process by the DSB before the adjudication begins through the panel process, and because the only way for a panel not to be established once it is requested is for the DSB to reach a negative consensus, formation is virtually automatic. The only requirement is that pursuant to Article 6.2 DSU the request for a panel must indicate "whether consultations were held". Panels have been very prudent in dealing with claims of unsatisfactory consultations. In EC - Bananas III the panel concluded that the private nature of the bilateral consultations means that panels are normally not in a position to evaluate how the consultation process functions, but could only determine whether consultations, if required, did in fact take place.

In India - Patent, the Appellate Body emphasised the due process requirement of consultations:

All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations....

The panel in Korea - Alcoholic Beverages refused to assess the adequacy of the consultations held by the parties.

The WTO jurisprudence so far has not recognized any concept of "adequacy" of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. ... We do not wish to imply that we consider consultations unimportant. Quite the contrary, consultations are a critical and

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51 Articles 4.7 and 6.1 DSU.
52 WT/DS27/R, paras. 7.18-7.19 (not appealed).
53 Above n. 21, para. 94. Emphasis added.
54 WT/DS75, 84/R, adopted 17 February 1999, and upheld by the Appellate Body, para. 10.19 (not appealed).
integral part of the DSU. But, we have no mandate to investigate the adequacy of the consultation process that took place between the parties and we decline to do so in the present case.

The Panel on Turkey - Textiles followed these precedents and added that “Consultations are ... intended to facilitate a mutually satisfactory settlement of the dispute, consistent with Article 3.7 of the DSU.”

In Korea - Dairy the parties explicitly requested that the panel assess the compatibility of their consultations with the requirements of Article 12 of the Agreement on Safeguards which mandates prior informal consultations (not DSU consultations) based on the chronology of events. The panel noted that the criterion for assessing the adequacy of consultations is not merely whether parties through such consultations settle their dispute; rather, what is relevant is whether the parties to the consultations are “able to negotiate effectively.”

The panel stated that the purpose of any consultation process is to favor efforts by the parties to reach a mutually agreed solution of their disagreement.

2. The content of the request for consultations versus a request for establishment of a panel

Moreover, the measures indicated in the request for consultations and those listed in the request for panel need not be identical. In US - FSC, the US complained that the EC’s request for consultations was inadequate. The Appellate Body stated that the request for consultations must give the reasons for the request and must identify the measure and the legal basis for the complaint under Article 4.4 DSU. But the Appellate Body concluded that Articles 4 and 6 DSU (as well as Articles 4(1)-(4) of the SCM on consultations) do not require that the specific

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55 "The only function we have as a panel in relation to Turkey’s procedural concerns is to ascertain whether consultations were properly requested, in terms of the DSU, that the complainant was ready to consult with the defendant and that the 60 day period has lapsed before the establishment of a panel was requested by the complainant." Turkey - Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted 19 November 1999 (“Turkey - Textiles”).

56 WT/DS98/R Korea - Dairy, para. 7.151.

57 Ibid., para. 7.153.

measures which are the subject of consultations be exactly the same as those identified in a request for the establishment of a panel.\textsuperscript{59}

The panel in \textit{Japan - Varietals} found that a claim that Article 7 of the SPS Agreement had been violated, raised in the request for establishment of the panel, was admissible, even though this claim was not identified in the request for consultations and there was no evidence that it had been discussed during consultations. Furthermore, inadequacy of consultations did not affect the jurisdiction of the Panel.\textsuperscript{60} In \textit{Turkey - Textiles}, the Panel noted that: “our terms of reference (our mandate) are determined, not with reference to the request for consultations, or the content of the consultations, but only with reference to the request for the establishment of a panel.”\textsuperscript{61}

Despite the position taken by the two panels referred to above, it is arguable that consultations on the “matter” in dispute are obligatory pursuant to Articles XXII:2, XXIII:1 GATT and Article 4.3 DSU, and that the “matter” referred to in Articles XXII:2 and XXIII:1 (on consultations) is the same as that in Article XXIII:2 GATT and Article 6 DSU (request for establishment of a panel). The “matter” was defined in \textit{Guatemala – Cement}\textsuperscript{62} and \textit{India – Patent}\textsuperscript{63} to include the specific measures at issue and the legal basis of the complaint (i.e. the violations), where each violation is distinctly identified. Consultations on the measures and the claims are thus mandatory. One approach that panels might take is to require that those issues or questions which are related to the initial matter and which arose during consultations be included in the panel request even if they do not appear in the initial request for consultations. What is truly “related” to the initial matter would thus ultimately have to be determined by the panel. Moreover, whether mere reference to a matter in a request for consultations, particularly in light of the requirement of good faith in Article 4.3 DSU, constitutes sufficient evidence that good faith consultations were effectively held such that the panel is authorised to adjudicate on the matter, has yet to be addressed.

\textsuperscript{59} “As stated by the Panel, “[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to ‘clarify the facts of the situation’, and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.” Appellate Body Report on Brazil – Expert Financing Programme for Aircraft, WT/DS46/AB/R, adopted 20 August 1999, (“Brazil – Aircraft”) para. 132.


\textsuperscript{61} WT/DS34/R, para. 9.24.

\textsuperscript{62} Above n. 27, para. 72.

\textsuperscript{63} Above n. 21, p. 22.
3. Timing of any objection

In all cases, claims of insufficient consultations or other challenges affecting the terms of reference (and the jurisdiction) of a panel must be raised at an early stage: 64

...The same principle of good faith requires that responding Members reasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.

4. The use of consultation material during the panel process

Documents exchanged during consultations have at times been submitted by parties in support of claims made in the request for a panel. For example, in Argentina – Textiles, the Panel accepted evidence submitted by the United States which had been received from the EC and originated from the consultations between Argentina and the EC. 65

C. Establishment of a panel and terms of reference

Where a dispute is not settled through consultations, the DSU permits the complaining party to require the establishment of a panel, at the latest, at the meeting of the DSB following that at which a request is made, unless the DSB decides by consensus against establishment. 66 The DSU also sets out specific rules and deadlines for deciding the terms of reference and composition of panels. Standard terms of reference will apply unless the parties agree to special terms within 20 days of the panel’s establishment. 67 On two occasions, attempts have

64 Above n. 58, para. 166.
66 Article 6 DSU. In the period 30 April 1999 to 19 June 2000, 12 of 34 requests for the establishment of panels resulted in such establishment the first time the request appeared on the DSB agenda.
67 Article 7 DSU.
been made to negotiate special terms of reference, and on both occasions, these attempts have failed. 68

Panels are established to examine the "matter" in dispute. 69 In practice, the terms of reference of a panel are determined by reference to the request for establishment of a panel. 70 A request for the establishment of a panel must contain two fundamental elements: a description of the specific measure(s) challenged, and the identification of the legal basis for the claims. Both must be sufficient to present the "problem" clearly. 71 In EC - Bananas III, the Appellate Body stated: 72

It is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.

Previous panels have examined measures not explicitly mentioned in the panel request on the ground that they were implementing, subsidiary or so closely related to measures that were specifically mentioned, that the responding party could reasonably be found to have received adequate notice of the scope of the claims asserted by the complainant. 73 WTO

68 Panel on Brazil - Desiccated Coconut as discussed in WT/DSB/M/11, pp. 3-4; and the Panel on Nicaragua - Measures Affecting Imports from Honduras and Columbia, WT/DS188 and WT/DS201, panel established 20 May 2000, as discussed in WT/DSB/M/80, para. 41.


70 Article 6.2 DSU provides that: "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly...." (emphasis added).

71 See for instance EC - Bananas III, above n. 12, paras. 139-144; Brazil - Desiccated Coconut, above n. 22, p. 22; India - Patents, above n. 21, paras. 86-96; Guatemala - Cement, above n. 27, paras. 72 and 76; and Korea - Dairy, above n. 21, paras 120-127.

72 Above n.12, paras. 141, 142. Emphasis added.

jurisprudence has further clarified these two aspects of a panel’s terms of reference. In Korea - Dairy, the Appellate Body had the opportunity to further elaborate its views on this issue: 74

Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated. Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing. We, therefore, deny Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU.

The obligation in Article 6 DSU to identify the claims implies a minimum requirement of listing the Articles claimed to have been violated. However, this may not always be sufficient, especially where a single article contains several distinct obligations. But most importantly, in assessing whether a request for a panel is sufficiently clear and detailed, a panel should take into account the ability of the respondent to defend itself against the identified claims. Finally, claims must be distinguished from arguments. 75 Only claims need be identified in the request for establishment of a panel; new arguments may be raised by the parties at the rebuttal stage, and panels are free to base

74 Above n. 21, paras. 124, 127, 130. Emphasis added.
75 “In our view, there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel’s terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.” EC - Bananas III, above n. 12, para. 141.
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their findings on any arguments, whether or not submitted by any party in the request for the establishment of a panel.\textsuperscript{76}

D. Composition of the panel

Composition of the panel begins with proposals by the Secretariat of candidate panelists, suggested on the basis of the parties' instructions and preferences. The Secretariat uses the Indicative List, the list of past panellists and any other source of information. Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. Where the parties do not agree on the composition of the panel within 20 days, any party can request that the Director-General determine the composition of the panel. In practice, the Director-General confirms the panelist(s) about whom the parties agreed, and nominates the other(s) based on the various and often contradictory requirements of the parties and the advice of the Secretariat.\textsuperscript{77} Prior to September 1998, the Director-General had been asked on eleven occasions to compose the panel.\textsuperscript{78} Since 1998, however, no such request has been made.

E. The necessary interest to initiate a dispute

Unlike requirements for standing in many international tribunals, the criteria for initiating DSU proceedings are easily met. In \textit{US - Shirts and Blouses}, the Appellate Body noted: "If any Member should consider that its benefits are nullified or impaired as the results of circumstances set out in Article XXIII, then dispute settlement is available."\textsuperscript{79} Similarly, in \textit{EC - Bananas}, the Appellate Body stated: \textsuperscript{80}

\ldots a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in

\textsuperscript{76} EC - Hormones, above n. 23, paras 155-156 and Argentina - Footwear, above n. 73, para. 74.
\textsuperscript{77} The Director-General nominated panelists pursuant to Article 8.7 DSU in the following disputes: WT/DS27, WT/DS38, WT/DS44, WT/DS54, WT/DS55, WT/DS60, WT/DS64, WT/DS75, WT/DS77, WT/DS79, WT/DS84, WT/DS87, WT/DS90, WT/DS99, WT/DS110.
\textsuperscript{79} Above n. 12, p. 13.
\textsuperscript{80} Above n. 12, paras. 135 and 136. (Emphasis added)
deciding whether any such action would be ‘fruitful’.... The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded.... We also agree with the Panel’s statement that: ... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.

Although a Member must have some real interest to initiate WTO dispute settlement proceedings, the Korea – Dairy Panel rejected the notion that this interest be of an economic nature. It did, however, note: “Even assuming that there is some requirement for economic interest, we consider that the European Communities, as an exporter of milk products to Korea, had sufficient interest to initiate and proceed with these dispute settlement proceedings.”

In all cases, only WTO Members may initiate WTO dispute settlement proceedings. This was clearly established in US – Shrimp and again in US – British Steel:

We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages participation in panel or Appellate Body proceedings, as a matter of legal right, only by parties and third parties to a dispute. And, under the DSU, only Members of the WTO have a legal right to participate as parties or third parties in a particular dispute.

However, panels and the Appellate Body may accept amicus briefs submitted by non-governmental organisations (NGOs).

F. Participation of private lawyers

In general, a Member State party to a dispute is free to determine the composition of its delegation in panel and Appellate Body proceedings. This includes the decision to enlist the services of private counsel. The question of the propriety of participation by private counsel first arose in EC – Bananas III, where the Appellate Body stated:  

82 Above n. 21, para. 101.
84 Above n. 12, para. 12.
We can find nothing in the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings... we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.

This ruling, which applied to Appellate Body proceedings, was extended to panel proceedings in Indonesia - Automobiles.\(^{85}\)

We conclude that it is for the Government of Indonesia to nominate the members of its delegation to meetings of this Panel, and we find no provision in the WTO Agreement or the DSU, including the standard rules of procedure included therein, which prevents a WTO Member from determining the composition of its delegation to WTO panel meetings. Nor does past practice in GATT and WTO dispute settlement point us to a different conclusion in this case.

WTO Members are now regularly represented by private counsel at all stages of the panel and Appellate Body proceedings.

G. Standard of review

In US - Underwear, the Appellate Body affirmed the panel's determination that the standard of review to be used in DSU proceedings is that described in Article 11 DSU: a panel is 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."\(^{86}\) The Anti-dumping Agreement contains a distinct though not entirely different standard of review, but for all other cases, the Article 11 standard of review is to be applied. The Appellate Body in EC - Hormones made this clear in its determination of the appropriate standard of review applicable to a complaint under the SPS Agreement: \(^{87}\)

The standard of review appropriately applicable in proceedings ... must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO

\(^{85}\) Above n. 27, para. 14.1.

\(^{86}\) WT/DS24/R, para. 5.50.

\(^{87}\) Above n. 24, paras. 115 - 118 (footnotes omitted).
and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the SPS Agreement itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that. In our view, Article 11 of the DSU articulates with great succinctness but with sufficient clarity 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. So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither de novo review as such, nor "total deference", but rather the "objective assessment of the facts". In so far as legal questions are concerned - that is, consistency or inconsistency of a Member's measure with the provisions of the applicable agreement - a standard not found in the text of the SPS Agreement itself cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law.

H. Burden of proof

Neither the DSU nor the Working Procedures make specific reference to the burden of proof on parties to a dispute. Referring to what could be viewed as a general practice of international tribunals, the Appellate Body addressed the issue at length in US - Shirts and Blouses, where it stated:

In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining.

89 Above n. 12, pp. 12-16.
90 Ibid., p. 14. The Appellate Body Report on US - Gasoline had already established that the burden of demonstrating that a measure falls under one of the justified exceptions to Article XX is on the country invoking the exception, above n. 15, pp. 22-23.
or defending, who asserts the affirmative of a particular claim or
defence. If that party adduces evidence sufficient to raise a
presumption that what is claimed is true, the burden then shifts to
the other party, who will fail unless it adduces sufficient evidence
to rebut the presumption.... In the context of the GATT 1994 and the
WTO Agreement, precisely how much and precisely what kind of
evidence will be required to establish such a presumption will
necessarily vary from measure to measure, provision to provision,
and case to case.

In EC - Hormones, the Appellate Body further elaborated the rule of burden
of proof: 91

.... It is also well to remember that a prima facie case is one which, in
the absence of effective refutation by the defending party, requires a
panel, as a matter of law, to rule in favour of the complaining party
presenting the prima facie case. (Emphasis added.)

It is important to remember that the significant investigative authority
that panels have under Article 13 DSU cannot be used by a panel to rule in
favour of a complaining party which has not established a prima facie
case of inconsistency based on specific legal claims asserted by it.92

A panel is entitled to seek information and advice from experts and
from any other relevant source it chooses, pursuant to Article 13 of the
DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to
understand and evaluate the evidence submitted and the arguments
made by the parties, but not to make the case for a complaining party.

I. Obligation to collaborate with the Panel and negative inferences

A problem related to burden of proof is that of determining what course of
action is available to a panel when a party refuses to provide requested
information. 93 The Appellate Body in Canada - Aircraft stated unequivocally
that such refusal is unacceptable: 94

91 Above n. 23, paras. 104 and 109.
92 Australia - Salomon, above n. 73, para. 129.
93 Note however "[T]he burden of proof is a procedural concept which speaks to the fair
and orderly management and disposition of a dispute. The burden of proof is distinct
from, and is not to be confused with, the drawing of inferences from facts." Appellate
Body Report on Canada - Aircraft, WT/DS90/AB/R, para.198
94 Ibid., paras. 188-189.
Members are... under a duty and an obligation to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU.... If Members that were requested by a panel to provide information had no legal duty to "respond" by providing such information, that panel's undoubted legal "right to seek" information under the first sentence of Article 13.1 would be rendered meaningless. A Member party to a dispute could, at will, thwart the panel's fact-finding powers and take control itself of the information-gathering process that Articles 12 and 13 of the DSU place in the hands of the panel. A Member could, in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it and, inevitably, from going forward with the legal characterization of those facts. To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences.

Even if a Member chooses to ignore this ruling and withholds information, a panel may draw inferences, even negative inferences, from the information which parties do furnish or refuse to furnish. In the same dispute, the Appellate Body stated that, in such a situation, the authority to draw inferences: 95

... seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.... Clearly, in our view, the Panel [has] the legal authority and the discretion to draw inferences from the facts before it - including the fact that [a party] had refused to provide information sought by the Panel.

According to the Appellate Body, a panel is authorised to draw inferences from the information or material it does receive from parties. 96

95 Ibid., paras. 202 - 203.
96 Ibid., paras. 197 - 198.
... The DSU does not purport to state in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts. Yet, in all cases, in carrying out their mandate and seeking to achieve the “objective assessment of the facts” required by Article 11 of the DSU, panels routinely draw inferences from the facts placed on the record. ... The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a prima facie case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel’s basic task of finding and characterizing the facts making up a dispute.

The Appellate Body, however, cautioned against drawing negative inferences as punishment to a party for refusing to provide information.97 The nature and scope of many WTO obligations are such that WTO panels are confronted with a much higher volume of facts than were GATT panels when deciding disputes. Given this situation, issues such as the burden of proof or the possibility of drawing inferences are sure to become very important.

J. Judicial economy

While a complaining party is required to list all of its claims in its request for the establishment of a panel, the panel is under no obligation to examine and decide all of these claims. In 1997, in US – Shirts and Blouses, the Appellate Body upheld the panel’s conclusion that:98

Nothing in the DSU or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. ... Given 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 or the Appellate Body to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel needs only address those claims which must be addressed in order to resolve the matter in issue in the dispute.

97 Ibid., para. 200.
98 Above n. 12, pp. 18 and 19. See also India – Patents, above n. 21, para. 87 “...[A] panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties — provided that those claims are within that panel’s terms of reference....”
One year later, the need to secure a positive and effective solution to disputes, led the Appellate Body in *Australia - Salmon* to qualify its previous conclusion and state that: 99

To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members".

The difficult issue is that a panel's decision not to address certain claims may result in the Appellate Body feeling obliged, after overturning some of the panel's findings, to adjudicate on claims that were not addressed in the panel report. 100

**K. Panel process**

1. Duration of the panel process

Panel procedures are set forth in detail in the DSU and its appendices. It is envisaged that a panel will normally complete its work within six months after its composition or nine months after its establishment or, in cases of urgency, within three months after its composition. 101 Only one panel, US - *Shirts and Blouses*, has managed to issue its report to the parties within six months of its composition. None of the three panels dealing with export subsidies claims, subject thus to a three months process, have managed to respect their deadline. 102 Panel reports may be considered by the DSB for adoption twenty days after they are issued to Members. Within sixty days of circulation, the report will be adopted unless the DSB decides by consensus not to adopt it, or if one of the parties to the dispute notifies the DSB of its intention to appeal. 103

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99 Above n. 73, para. 223.
100 See Section O below.
101 Articles 12.8 and 20 DSU. The same applies to export subsidies, see Article 4.6 of the SCM Agreement.
102 The *Australia - Leather* panel (WT/DS/126) took eleven months, and the *Canada - Aircraft* and *Brazil - Aircraft* panels took nine months.
103 DSU Article 16 DSU.
2. Due process, fairness and the need for specific working procedures

The Appellate Body emphasised the need for panels to respect "due process" and to adopt more detailed and comprehensive rules of procedure than those contained in the DSU: "As we have observed in two previous Appellate Body Reports, we believe that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings." 

On a somewhat ad hoc basis, panels have developed and expanded their rules of procedure to take cover specific situations such as the need for preliminary rulings, the exchange of submissions, the language of the proceedings, the work of experts, the protection of confidential information and other aspects of the panel process. This does not mean that separate rules must be developed for every situation or for each case. For example, in the Aircraft disputes between Canada and Brazil, the Appellate Body, in response to a request by the EC (as a third-party), concluded that, given the circumstances of the case, it was not necessary to adopt additional procedures for the protection of confidential business information in the appellate proceedings. Panels, however, have continued to adopt special working procedures for dealing with confidential business information, such as those adopted in the Implementation Panels on Australia - Salmon and Canada - Aircraft.

L. Confidentiality

The obligation to protect the confidentiality of panel and Appellate Body proceedings, including the submissions, is provided for in Articles 14.1, 17.10 and paragraph 3 of Appendix 3 DSU. It is also addressed in Articles VI and VII of the Rules of Conduct (dealing with confidentiality in general and with evidence) and in Part I Article 10(1) of the Working Procedures for Appellate Review.

104 For instance see the Appellate Body Reports on EC - Bananas III, WT/DS27/AB/R, para. 144 and para. 152 fn 138; on EC - Hormones, above n. 23, para. 154; on India - Patent, above n. 21, paras. 94 and 95; and on Australia - Salmon, above n. 73, paras. 272 and 278.

105 Argentina - Textiles, above n. 65, para. 79, footnote 6, with reference to EC - Bananas III, above n. 102, para. 144 and India - Patent, above n. 21, para. 95. See also US - Shrimp, above n. 21, para. 105 and WT/DS161 and 169/R Korea - Dairy, p. 40 fn. 81.

106 WT/DSB/RC/1.
Pursuant to Articles 17.10 and 18.2 DSU, all WTO written submissions or any information submitted or received in an Appellate Body proceeding is to be treated as confidential. Members are further obliged to ensure that such confidentiality is fully respected by any person selected by a Member to act as representative, counsel or consultant. In Canada - Aircraft, the Appellate Body declined to adopt additional procedures to protect sensitive business information\textsuperscript{107} and confirmed the findings of the panel in Indonesia - Automobile that:\textsuperscript{108}

All members of parties' delegations - whether or not they are government employees - are present as representatives of their governments, and as such are subject to the provisions of the DSU and of the standard working procedures, including Articles 18.1 and 18.2 of the DSU and paragraphs 2 and 3 of those procedures. In particular, parties are required to treat as confidential all submissions to the Panel and all information so designated by other Members; and, in addition, the Panel meets in closed session. Accordingly, it is for all delegations to fully respect those obligations and treat these proceedings with the utmost circumspection and discretion.

Panels have, at times, found it necessary to adopt special additional working procedures to protect confidential business or governmental information, although most often existing rules of confidentiality are seen to be sufficient. For example, in Australia - Salmon, the implementation panel found it appropriate to add two rules to protect confidentiality of submissions. The Panel noted that, given the government to government relationship of the matter before it, and that no direct business interests were involved, there was no risk that sensitive business information could leak to private competitors through WTO dispute settlement, and that existing rules were sufficient to assuage most concerns. However, there remained a risk that: \textsuperscript{109}

the Panel may, in its public report, quote from the confidential information or refer to the author of such information when using it in support of either party...[and] the risk of leaks occurring subsequent to the completion of the DSU proceedings.

The panel, therefore, added rules addressing these specific concerns for the purpose of resolving the particular controversy before it.

\textsuperscript{107} Above n. 93, paras. 141-147.
\textsuperscript{108} Above n. 27, para. 14.1.
\textsuperscript{109} Above n. 73, para. 7.7. See also Implementation Panel (Art. 21.5 DSU) on Australia - Leather, (WT/DS126/RW), p. 3.
M. Experts

Article 13 DSU (and Appendix 4) allows a panel to seek information and opinions from individual experts or to establish an expert review group, as it deems appropriate in a particular case. Certain agreements even require that experts be consulted in dispute settlement proceedings. In EC-Hormones the Appellate Body upheld the panel's decision to request the opinion of experts on certain scientific and other technical matters raised by the parties to the dispute rather than establish an expert review group, because "the Panel considered it more useful to leave open the possibility of receiving a range of opinions from the experts in their individual capacity". So far, experts have been relied on primarily in the context of complaints relating to the SPS Agreement or involving an Article XX environmental protection defence, though at times they have been called upon in other situations.

In its reports on Canada-Aircraft and India-Quantitative Restrictions, the Appellate Body specified, however, that a panel is not precluded from considering expert advice or evidence submitted by the defending party until the complaining party has established a prima facie case.

A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a prima facie case or defence.

But, as mentioned before panels cannot use their investigating power under Article 13 of the DSU to "make the case for the complaining party".

N. Amicus briefs

In US-Shrimp, the Appellate Body decided that although only Members have the right to initiate DSU proceedings and have their arguments addressed by panels, Article 13 DSU authorises panels to accept unsolicited

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110 See, e.g., Article 11.2 of the SPS Agreement and Article 13 of the TBT Agreement.
111 Above n. 23, para. 146.
112 Experts were also used for instance in US-Shrimp, above n. 21, paras. 146-149; Japan-Varietals, above n. 60, paras. 127-130; Australia-Salmon, above n. 73, paras XXXX; and Japan-Film, above n. 73.
113 Above n. 93, paras. 192-194.
114 WT/DS90/AB/R, paras. 149-151.
115 Above n. 93, para. 192.
116 Above n. 60, para. 129.
amicus briefs. In US - British Steel, the Appellate Body concluded that it also is authorised to accept amicus briefs since neither the DSU nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs and Article 17.9 DSU makes it clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. The Appellate Body stated:

We are of the opinion that we have the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two amicus curiae briefs filed into account in rendering our decision.

At the moment, panels do not have any instructions from the Members concerning the criteria for consideration of amicus briefs. As with all panel decisions, the administration by panels of solicited or unsolicited amicus briefs will have to be made on an objective assessment of the facts and the law, pursuant to Article 11 DSU, and as such will constitute reviewable acts. It is not yet clear what alternatives are open to panels, however, the Appellate Body in US - Shrimp seems to have indicated a wide range of action. Some

170 Above n. 21, para. 108: "A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. The fact that a panel may motu proprio have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted."

118 In addition, Rule 16(1) of the Working Procedures allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the Working Procedures.


20 Above n. 21, para 101: "A panel’s authority includes the authority to decide not to seek such information or advice at all. We consider that a panel also has the authority to accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof. It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevance of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received." 106: "The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU 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.” (emphasis added).
Members have questioned the legal authority of the panels and the Appellate Body to accept information or *amicus* briefs from non-WTO Members.\(^{121}\)

The Director-General, in response to certain comments following the circulation of the Appellate Body report in *US - British Steel*, issued a statement regarding the Appellate Body’s decision to accept unsolicited *amicus* briefs. It was emphasised that nothing in the Appellate Body working procedures prohibited it from accepting the briefs, and that because it was not adopting any new working procedures, the Appellate Body was under no obligation to consult with the Director General or the Chairman of the DSB prior to such acceptance. Indeed, it would have been inappropriate for the Appellate Body to do so.\(^{122}\)

The tendency appears to be in the direction of giving panels broad discretion in accepting outside sources of information and even legal arguments. For example, in Implementation panel (Article 21.5 DSU) of *Australia - Salmon*, the Panel had received an unsolicited letter from the "Concerned Fishermen and Processors in South Australia" which it accepted. It noted:\(^{123}\)

> We confirm this ruling recalling, in particular, that the information submitted in the letter has a direct bearing on a claim that was already raised by Canada, namely inconsistency in the sense of Article 5.5 of the SPS Agreement in the treatment by Australia of pilchard *versus* salmon imports.

Most recently, in *United States - Section 110(5) of the Copyright Act*, the Panel discussed treatment of information contained in a letter to the USTR which was copied to the Panel, indicating that while they were not refusing the letter, neither were they basing their decision on its contents:\(^{124}\)

> In this dispute, we do not reject outright the information contained in the letter from the law firm representing ASCAP to the USTR that was copied to the Panel. We recall that the Appellate Body has

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\(^{121}\) See Minutes of the DSB, 7 June 2000, WT/DSB/M/83.

\(^{122}\) See WT/DSB/M/84, p. 20. See also, the discussion of acceptance of *amicus* briefs with reference to *US - Shrimp*, WT/DSB/M/50, p. 5.

\(^{123}\) Above n. 73, para 7.9, citing the Appellate Body Report on *US-Shrimp*, WT/DS58/AB/R, para. 108, emphasis by panel.

recognized the authority of panels to accept non-requested information. However, we share the view expressed by the parties that this letter essentially duplicates information already submitted by the parties. We also emphasize that the letter was not addressed to the Panel but only copied to it. Therefore, while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings.

In EC - Asbestos, the Panel received non-solicited amicus briefs from four NGOs just before and after the first meeting of the Panel. These briefs were transmitted to the parties for their information. In response, the EC incorporated two of the briefs into its submission, and requested the Panel to reject the two others as lacking relevance. Canada, by contrast, requested the Panel to ignore all amicus briefs in light of their general nature and the advanced stage of the proceedings. In the alternative, if the Panel decided to accept the briefs, “for the sake of procedural fairness, the parties should have an opportunity to comment on their content.” Before the second panel meeting, the Panel stated that it would consider the amicus briefs incorporated by the EC on the same basis as the other documents it furnished, and submit them to the scientific experts for their information. At the second panel meeting, the Panel gave Canada the opportunity to reply, in writing or orally, to the arguments set forth in the two amicus briefs. At that same meeting, the Panel, without offering reasons, informed the parties that it had decided not to take into consideration the other two amicus briefs.

After the interim report was issued the Panel received a fifth brief from Only Nature Endures. The Panel decided not to accept this brief at this late stage of the procedure, but copied the brief to the parties and informed them and the NGO of its decision.

O. Appellate process

The concept of appellate review is an important new feature of the DSU. An Appellate Body was established to carry out this function. It is composed of seven members, three of whom serve on any one case, although, in an effort toward coherence and consistency, the working procedures of the Appellate Body provide for an "exchange of views" between all members

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126 The current members include: J. Lacarte (Uruguay), C. Ehlermann (EC), F. Feliciano (Philippines), A. Ganesan (India), Y. Taniguchi (Japan) J. Bacchus (USA), and G. Abi-Saab (Egypt).
of the Appellate Body on each dispute.\textsuperscript{127} Independence of the Appellate Body in all areas of its operation is essential, to the point that, remarkably, the Working Practices for Appellate Review are drawn up by the Appellate Body with only a consultative process with the Director-General and the Chairman of the DSB.\textsuperscript{128}

An appeal has to be filed before the panel report is adopted by the DSB, i.e. within the sixty days following its circulation. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel.\textsuperscript{129} The distinction between questions of law and questions of facts, however, is not always simple, and is directly related to the obligation of panels to perform an objective assessment of the facts and the law. Therefore, only certain factual assessments can be appealed. The Appellate Body Report on \textit{EC - Hormones} was the first case to expound on this matter.\textsuperscript{130}

Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. \textit{Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body.} The determination of whether or not a certain event did occur in time and space is typically a question of fact; ... Determination of the credibility and weight properly to be ascribed to ... a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of fact. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or

\begin{footnotesize}
\textsuperscript{127} WT/AB/WP/1, Rule 4(3) (Collegiality).
\textsuperscript{128} Article 17.9 DSU. The Appellate Body adopted its Working Practices on 15 February 1996 after consultation with the Chairman of the DSB and the Director-General. See WT/AB/WP/1; WT/AB/WP/3.
\textsuperscript{129} Article 17.6 DSU. The distinction between a question of law and a question of facts is not always simple especially since many WTO disciplines involved mixed questions of facts and law. For instance the national treatment obligation of Article III or the defence based on Article XX are typical provisions that involved determinations of mixed questions of facts and law.
\textsuperscript{130} WT/DS26 and 48/AB/R paras. 132-133. (Emphasis added) See also \textit{Korea - Alcoholic Beverages}, above n. 54, paras 161- 162. "The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. A panel's discretion as trier of facts is not, of course, unlimited. That discretion is always subject to, and is circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it."
not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review. The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. ... The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel’s duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. “Disregard” and “distortion” and “misrepresentation” of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice....

Principles of equity and judicial economy and the absence of provision for remand, have led the Appellate Body on a few occasions to complete or add to the panel’s conclusions when it considered that, after reversing the panel’s decision, the legal analysis required further elaboration. 131 For instance in EC – Poultry, the Appellate Body stated: 132

Brazil did not include a claim relating to Article 5.5 of the Agreement on Agriculture in its notice of appeal. Nor did Brazil claim in its appellant’s submission that the Panel erred in failing to make a finding relating to Article 5.5. The European Communities later filed an appellant’s submission of its own appealing the Panel’s finding on Article 5.1(b) of the Agreement on Agriculture. Brazil then argued in reply in its appellee’s submission that if we reversed the Panel’s

131 Article 19 of the DSU.
finding on Article 5.1(b), it would then be necessary for us to address the issues arising under Articles 5.5 and 4.2 of the Agreement on Agriculture. Having decided to reverse the Panel’s finding relating to Article 5.1(b), we turn now to these additional issues. ... We are aware of the provisions of Article 17 of the DSU that state our jurisdiction and our mandate. Article 17.6 of the DSU provides: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”. Article 17.13 of the DSU states: “The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.” In certain appeals, however, the reversal of a panel’s finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel. This occurred, for example, in the appeals in United States - Standards for Reformulated and Conventional Gasoline and in Canada - Certain Measures Concerning Periodicals. And, in this appeal, as we have reversed the Panel’s finding on Article 5.1(b), we believe we should complete our analysis of the c.i.f. import price by making a finding with respect to the consistency of the EC regulation with Article 5.5, which was not addressed by the Panel for reasons of judicial economy.

Recently, in Canada - Aircraft\textsuperscript{133} and in US - FSC,\textsuperscript{134} the Appellate Body declined to examine a new argument that would have required it to solicit, receive and review new facts.

Appellate proceedings generally are not to exceed sixty days from the date a party formally notifies its decision to appeal, though Article 17.5 DSU provides the possibility of a thirty day extension. Working procedure 3(1) provides that whenever possible, decisions are to be taken by consensus. If consensus cannot be reached, Appellate Body decisions are taken by majority vote. Notice of appeal is to be made in writing, as outlined in Article 16.4 DSU. A party to the original dispute other than the original appellant may join the appeal within fifteen days after the filing of the Notice of Appeal (Rule 23(1)). Once an appeal commences, the division draws up a working schedule (Rule 26) and holds an oral hearing (Rule 27). At any time, the division may pose questions or request written responses (Rule 28). All documents filed must be served on all other participants, including third participants, and proof of such service must be furnished. (Rule 18). Failure to appear or to respond within the time

\textsuperscript{133} Above n. 93, para. 211.
\textsuperscript{134} Above n. 58, para. 102-103.
periods set by the division may result in dismissal of the appeal (Rule 29). Absolute confidentiality is required. No meeting may take place between a division Member and any of the parties without the presence of all participants to the appeal (Rule 19). And, an appeal may be withdrawn, particularly where a mutually agreed solution is reached and notified to the DSB as provided in Article 3.6 DSU (Rule 30).

Article 17.8 DSU provides that within thirty days following its circulation, the Appellate Body report and the panel report, as modified, reversed or upheld by the Appellate Body, are adopted together by the DSB, unless the DSB decides by consensus against its adoption. On 31 August 2000, thirty Appellate Body reports had been adopted by the DSB. The Appellate Body has upheld eight panel reports, modified at least some of the findings of the panels in twenty-two cases, and of these modifications, reversed panel's findings or reasoning in four cases.

P. Remedies

It has been argued that Article 19 DSU limits the scope of remedies available to a panel once the conclusion is reached that a challenged measure is inconsistent with the WTO Agreement. Article 19.1 reads as follows:

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

The wording of Article 19.1 makes clear that panels are obligated to recommend that the losing party "bring its measure into conformity"; however, it is unclear whether this is the only recommendation a panel may give. Article 19 does not, however, provide that it shall only recommend that the Member bring its measure into conformity. The use of the plural "recommendations" in the second sentence of Article 19.1 seems to imply that while a panel must recommend bringing the measure(s) into conformity, it may make other recommendations as well. All panel and Appellate Body reports generally contain one principal recommendation, the text of which usually reads "... recommends that the DSB request such member to bring its measure(s) into conformity with the covered agreements mentioned above." It is arguable that, in addition to the mandatory recommendation, other types of remedies recognised under
international law might be applicable to the extent that WTO Members have not contracted out of these remedies in the DSU. In addition to the various recommendations, panels may also make suggestions.\textsuperscript{135}

Traditionally, remedies in WTO/GATT disputes have been prospective, yet this is not necessarily a hardened rule. In the Implementation Panel (Article 21.5 DSU) on \textit{Australia - Leather}, in the context of the SCM Agreement, the panel found no meaningful distinction between repayment of prospective and retrospective portions of past subsidies, and thus ordered the retrospective reimbursement of the illegally-received subsidy. The panel reasoned:\textsuperscript{136}

\begin{quote}
We do not agree that it is possible to conclude that repayment of the "prospective portion" of prohibited subsidies paid in the past is a remedy having only prospective effect. In our view, where any repayment of any amount of a past subsidy is required or made, this by its very nature is not a purely prospective remedy. No theoretical construct allocating the subsidy over time can alter this fact. In our view, if the term "withdraw the subsidy" can properly be understood to encompass repayment of any portion of a prohibited subsidy, "retroactive effect" exists.
\end{quote}

Article 22 DSU provides that two temporary remedial actions available to a Member in the event that panel recommendations and rulings are not implemented, compensation and the suspension of concessions or other obligations.\textsuperscript{137} During the Seattle Ministerial conference, in relation to the DSU review, a group of developing countries suggested that further consideration should be given to financial compensation as an alternative remedy.\textsuperscript{138}

\textbf{Q. Reasonable period for implementation}

Once the panel report and, if any, the Appellate Body report are adopted, under Article 21 DSU the party obliged to bring its measure(s) into conformity must notify its intentions with respect to implementation of adopted recommendations. If it is impracticable to comply immediately,


\textsuperscript{136} Above n. 109, para. 6.22.

\textsuperscript{137} See Sections S and T below.

\textsuperscript{138} WT/MIN(99)/5, especially p. 227, para. 86 (investment) and p. 306, para. 98 (government procurement).
the party concerned may be given a reasonable period of time, to be decided either by agreement of the parties concerned, with approval by the DSB within forty-five days of adoption of the report, or through arbitration within ninety days of adoption of the report. In practice, a member of the Appellate Body acts as the Article 21.3(c) DSU arbitrator. This article also provides that fifteen months should be used by arbitrators as a guideline for the reasonable period of implementation but that this period may be shorter or longer, depending on circumstances. At this writing, eight Arbitration Reports have been issued pursuant to DSU Article 21.3(c) DSU. The reasonable period for implementation has varied from six months (in Canada – Patent), eight months (in Australia – Salmon), twelve months (in Indonesia – Automobiles) to fifteen months (in EC- Bananas) and the others. In Indonesia – Automobiles, Indonesia had requested an additional period of nine months following the issuance of its implementing measure as a “transition” period to allow the affected companies/industries to make structural adjustments. The Arbitrator rejected Indonesia’s claim and stated:

In virtually every case in which a measure has been found to be inconsistent with a Member’s obligations under the GATT 1994 or any other covered agreement, and therefore, must be brought into conformity with that agreement, some degree of adjustment by the domestic industry of the Member concerned will be necessary. This will be the case regardless of whether the Member concerned is a developed or a developing country. Structural adjustment to the withdrawal or the modification of an inconsistent measure, therefore, is not a “particular circumstance” that can be taken into account in determining the reasonable period of time under Article 21.3(c).

The Arbitrator stated, however, that Article 21.2 DSU requires that particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement which form part of the context for Article 21.3(c) DSU and which is important to take into account here.

139 See the Art 21.3(c) Arbitration Reports on Japan – Alcoholic Beverages (WT/DS8/15, DS10/15 DS11/13 – 15 months), on EC- Bananas (WT/DS27/15 - 15 months), on EC – Hormones (WT/DS26/15,48/13 - 15 months), on Indonesia – Automobiles (WT/DS54/15, DS55/14, DS59/13, DS64/12 - 12 months), on Australia – Salmon (WT/DS18/9 - 8 months), on Korea – Alcoholic Beverages (WT/DS75/16, DS84/14 - 11 months and 2 weeks), on Chile – Alcoholic Beverages (WT/87/15, DS110/14 – 14 months and 9 days), and on Canada – Patent Protection (WT/DS114/13 – 6 months).

140 WT/DS54/15, DS55/14, DS59/13 and DS64/12, para. 29.
Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is "near collapse". In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia’s domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case.\textsuperscript{141}

The Article 21.3(c) Arbitration on \textit{Canada - Terms of Protection}, concluded that such “particular circumstances” could include considerations 1) whether the implementation will be done by administrative or legislative means; 2) of the complexity of the proposed implementation; and 3) whether the component steps leading to implementation were legally binding or discretionary.\textsuperscript{142}

However, in my view, the “particular circumstances” mentioned in Article 21.3 do \textit{not} include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member. Any such unrelated factors are irrelevant to determining the “reasonable period of time” for implementation. For example, as others have ruled in previous Article 21.3 arbitrations, any proposed period intended to allow for the “structural adjustment” of an affected domestic industry will not be relevant to an assessment of the legal process.\textsuperscript{143} The determination of a “reasonable period of time” must be a legal judgment based on an examination of relevant legal requirements.\textsuperscript{144}

\textsuperscript{141} Idem.

\textsuperscript{142} WT/DS114/13, paras 48 to 51.

\textsuperscript{143} See Award of the Arbitrator under Article 21.3(c) in \textit{Indonesia - Certain Measures Affecting the Automobiles}, above n. 140 and \textit{Japan – Taxes on Alcoholic Beverages}, above n. 139, paras. 19 and 27.

\textsuperscript{144} Above n. 140, paras. 3 and 10 of its submission, the EC stated that, during earlier consultations, Canada had offered to implement the recommendations and rulings of the DSB in nine months. Canada argued in the oral hearing in this arbitration that this offer had been made without prejudice during confidential consultations, and that, by submitting this evidence to me, the European Communities was in breach of Article 4.6 of the DSU, which reads: “Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.” It is not clear to me that my mandate allows me to rule on whether submission by the European Communities of evidence of an earlier offer by Canada on defining “a reasonable period of time” in this case is inconsistent with Article 4.6 of the DSU. However, it is not necessary to do so, as I am able to arrive at a clear determination in this case without considering this evidence, whatever its legitimacy or merits. And I have not considered it in making my determination. Therefore, I make no ruling on Canada’s argument relating to Article 4.6.
The same Arbitrator also concluded that there is no need nor even any possibility for the Arbitrator pursuant to Article 21.3(c) to assess the WTO compatibility of the implementing measure.\textsuperscript{145}

My responsibility does not, however, include in any respect a determination of the consistency of the proposed implementing measure with the recommendations and rulings of the DSB. The proper concern of an arbitrator under Article 21.3(c) is with \textit{when}, not \textit{what}.... \textit{What} a Member must do to comply with the recommendations and rulings of the DSB in any particular case is addressed elsewhere in the DSU. Article 21.5 sets out special procedures for determining “the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” resulting from a dispute. If there is any question about whether \textit{what} a Member chooses as a means of implementation is sufficient to comply with the recommendations and rulings of the DSB, as opposed to \textit{when} that Member proposes to do it, then Article 21.5 applies, not Article 21.3. The reasons are many and obvious. For example, if the consistency of implementing measures could also be examined during arbitrations under Article 21.3(c), then Article 21.5 would lose much of its effect. Parties would have little to lose in requesting also from an arbitrator under Article 21.3(c) an immediate ruling on the consistency of a proposed measure. Also, the more elaborate Article 21.5 procedures, involving a panel of three or five members and a report adopted by the DSB, seem more suitable than the more constrained legal domain of Article 21.3(c) for assessing the consistency of substantive obligations under WTO covered agreements.

The most important conclusion to be drawn from these Arbitration Reports is that immediate implementation remains the rule. It is clear, the \textit{EC - Hormones} arbitration panel wrote, “that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.”\textsuperscript{146}

In any event, the DSB maintains regular surveillance of implementation until the issue is resolved. Article 21.6 DSU provides that the issue of implementation may be raised by any Member at any time after a report is adopted. Generally, it is placed on the agenda of the DSB meeting six

\textsuperscript{145} Ibid., paras 41-42. Emphasis added.

\textsuperscript{146} Above n. 139, para. 26.
months after the establishment of the reasonable period of time for compliance and remains on the agenda as long as necessary to resolve the issue. Written status reports are furnished by the implementing Members during this time and are discussed by members at each regular DSB meeting.\textsuperscript{147}

\textbf{R. Assessment of the WTO compatibility of the implementation measure}

When parties disagree as to whether the party at fault has properly implemented the recommendations of the DSB (Panel and Appellate Body reports), Article 21.5 DSU provides that:

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

To date, seven implementation panels have been established to examine the WTO compatibility of the implementing measure(s). In all cases, the original panels were given the mandate to do so. The panel in \textit{US - Certain Measures} explained:\textsuperscript{148}

...when an assessment of the WTO compatibility of a measure taken to comply with panel and Appellate Body recommendations (an "implementing measure") is necessary (because parties disagree), ... Members are obligated to have recourse exclusively to a WTO/DSU dispute settlement mechanism to obtain a determination that [the] measure is WTO inconsistent. We consider that the obligation to use the WTO multilateral dispute settlement mechanism (i.e. as opposed to unilateral or even regional mechanisms) to obtain any determination of WTO compatibility, is a fundamental obligation that finds application throughout the DSU. ... We do not consider that the first sentence of Article 21.5 is only of a procedural nature but rather contains a substantive obligation....

\textsuperscript{147} See for instance the status reports in the \textit{US - Gasoline} dispute, WT/DS2/10 to WT/DS2/10add.7.

The Implementation Panel on *Australia – Salmon* stated clearly that the mandate given to the original panel pursuant to Article 21.5 includes the consideration of issues relating to two types of disagreements, namely disagreements as to the existence or consistency with a covered agreement of measures taken to comply with [DSB] recommendations and rulings. The reference to "disagreement as to the ... consistency with a covered agreement" of certain measures, implies that an Article 21.5 compliance panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in the light of any provision of any of the covered agreements.

Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original panel; nor to consistency with specific WTO provisions under which the original panel found violations. If the intention behind this provision of the DSU had been to limit the mandate of Article 21.5 compliance panels in any of these ways, the text would have specified such limitation. The text, however, refers generally to "consistency with a covered agreement". The *rationale* behind this is obvious: a complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again if an implementing Member in seeking to comply with DSB recommendations under a covered agreement is breaching, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of "prompt compliance" with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU.149

Another issue concerns the scope of the "measure taken to comply" which is the object of the Article 21.5 DSU process. The same Implementation panel on *Australia – Salmon* stated that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply".150

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149 Above n. 73, para. 7.19 sub-paragraph 9.
we are of the view that in the context of this dispute at least any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute – and within a more or less limited period of time thereafter – that applies to imports of fresh chilled or frozen salmon from Canada, is a “measure taken to comply. Several elements have prompted us to decide that the Panel request does, indeed, cover the Tasmanian ban even though the ban was only introduced subsequent to this Panel’s establishment and therefore not expressis verbis mentioned in Canada’s Panel request. Previous panels have examined measures not explicitly mentioned in the panel request on the ground that they were implementing, subsidiary or so closely related to measures that were specifically mentioned, that the responding party could reasonably be found to have received adequate notice of the scope of the claims asserted by the complainant. ... What is referred to this Article 21.5 Panel is basically a disagreement as to implementation. One measure was explicitly identified, with the knowledge, however, that further measures might be taken. To exclude such further measures from our mandate once we have found that they are “measures taken to comply”, would go against the objective of “prompt compliance” set out in Articles 3.3 and 21.1 of the DSU. ... We do not consider that measures taken subsequently to the establishment of an Article 21.5 compliance panel should per force be excluded from its mandate. Even before an original panel such measures were found to fall within the panel’s mandate because, in that specific case, the new measures did not alter the substance – only the legal form – of the original measure that was explicitly mentioned in the request. In compliance panels we are of the view that there may be different and, arguably, even more compelling reasons to examine measures introduced during the proceedings. As noted earlier, compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any “measures taken to comply” can be presumed to fall within the panel’s mandate, unless a genuine lack of notice can be pointed to. Especially under the first leg of Article 21.5 when it comes to disagreements on the existence of measures taken to comply, one can hardly expect that all such measures – when there is no clarity on their very existence – be explicitly mentioned up-front in the panel request.

151 EC - Bananas III, above n. 104, para. 7.27 and para. 140; Japan - Film, above n. 73, para. 10.8; Australia - Salmon, above n. 73, paras. 90-105; and Argentina - Footwear, above n. 73, paras. 8.23-8.46.
Finally, as to issue whether or not a new measure, i.e. an implementing measure effectively "exist", the same Implementation Panel stated: 152

In our view, a new regime of implementing measures can be said to "exist" when this regime sets out all requirements and criteria under which the product concerned can enter the market of the implementing Member. For products to be able to enter the market, the new measures setting out these requirements and criteria also have to be in force. We do not consider a framework regulation setting out the basic - but not all - requirements and criteria to be sufficient for a new regime to "exist". On the other hand, we do not consider it necessary that product has actually entered the market. In our view, of decisive importance is whether under the new regime trade opportunities effectively exist; not whether they will occur in the future, nor whether they have actually given rise to specific transactions in the past.

There has also been much debate among the Members regarding the sequence of procedures leading to the right to retaliate through the suspension of concessions or other obligations as outlined in Article 22 DSU. In particular, there has been some question regarding when the assessment of the WTO-compatibility of the implementing measure is to occur, and whether the provision allowing "recourse to these dispute settlement procedures" is a substantive obligation or merely one possible step in the process. 153

It is unclear whether the reference in Article 21.5 DSU to "these dispute settlement procedures" includes full consultations or just the panel process as such. It also says nothing about adjustments in the reasonable period of implementation. Members are presently discussing these interpretative problems in the DSU review exercise. Although consensus has not yet been reached on all aspects, a proposal is under discussion suggesting the addition of an Article 21bis, which would deal with the determination of compliance in case of disagreement between the parties concerned. The amendment calls for the establishment of a "compliance panel" whose decision would be not be subject to appeal. Additionally, the amendment makes clear that a complainant may not request authorisation to suspend concessions until the 21bis procedures are completed. 154 These DSU Review proposals have not been followed by Members. In the Canada - Air-

152 Above n. 73, para. 7.28.
153 See Section I below.
154 See WT/DSB/M/70, at pps. 13-31.
craft and Brazil - Aircraft disputes, both reports of the Implementation panels were appealed and all parties had agreed that the arbitration on the level of suspension pursuant to Article 22.6 DSU would proceed concurrently.155

S. Compensation

Article 22 DSU sets out the rules relating to compensation and the suspension of concessions in the event of non-implementation. If a Member fails to comply with panel and Appellate Body recommendations within the established reasonable period of time, the winning party or parties may have recourse to this article. Parties may thus enter into negotiations to agree on mutually acceptable compensation. Compensation must be voluntary and imposed in compliance with all covered agreements, including in respect of the most-favoured-nation treatment. Such negotiations were successfully undertaken between Japan and the EC, the US and Canada in Japan - Alcoholic Beverages, where Japan agreed to reduce tariffs once the reasonable period of time set by the arbitrator in February 1997 expired.156

T. Retaliation

Where agreement is not reached on compensation, a party to the dispute may request DSB authorisation to suspend concessions or other obligations it has undertaken vis-à-vis the other party. Arbitrators have substantially discounted the level of suspension claimed by complainants. This may reflect the practice of complainants of inflating claims. In the EC - Hormones (Article 22.6) Arbitration, the level of nullification was assessed to be US$ 116.8 million for the US, which had claimed US$202 million157 and C$ 11.3 million for Canada, which had claimed C$75 million.158 In the EC - Bananas III, the US requested US$520 million and was awarded US$ 191.4 million.159 Ecuador in the same dispute requested cross-retaliation for an amount of US$450 million and was authorised to retaliate for an amount of US$201.6 million.160 In the Brazil - Aircraft case, Canada requested retaliation for an amount of C$700 million per annum and was authorised to do so for an amount of C$344.2 million per annum.

155 See the WT/DSB/M/ 81.
156 WT/DSB/20, WT/DS10/20, WT/DS11/18. See the Minutes of the DSB at WT/DSB/M/41.
157 Article 22.6 Arbitration Report on EC - Hormones (US), WT/DS26/ARB/US.
158 Article 22.6 Arbitration Report on EC - Hormones (CAN), WT/DS48/CAN.
159 Article 22.6 Arbitration Report on EC - Bananas III (US), WT/DS27/ARB/US.
160 Article 22.6 Arbitration Report on EC - Bananas III (BCU), WT/DS27/ARB/ECU.
The mandate of any Arbitration pursuant to Articles 22.6 and 22.2 DSU is to determine the level of suspension of concessions or obligations that is "equivalent" to the level of nullification or impairment caused by the WTO inconsistent measure. This standard is distinct from that of "appropriateness" referred to in Article XXIII GATT.

The Article 22.6 Arbitration Panel of EC – Bananas III (US) concluded that retaliation pursuant to Article 22.6 DSU was adequate if "it effectively induces compliance". The Arbitration panel (Articles 22.6 DSU and 4.11 SCM) of Brazil – Aircraft concluded that, contrary to countermeasures adopted pursuant to Article 22.6 DSU, the concept of nullification and impairment is not to be found in Articles 3 and 4 of the SCM Agreement and the only limitation to any countermeasure implemented pursuant to Articles 4.10 and 4.11 SCM and footnotes 10 and 11, is that they be "appropriate".

While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification or impairment will be appropriate, we recall that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment.

An important debate surrounds the procedure leading to DSB authorisation to suspend concessions. The issue first arose in EC – Bananas when the US requested DSB permission to retaliate against EC imports after the reasonable period of time had expired for the EC to implement panel and Appellate Body rulings. The EC argued that the US was required to exhaust the Article 21.5 procedures before requesting DSB permission to retaliate pursuant to Article 22.2 DSU. The DSB in this case addressed the problem by assigning the original panel with two mandates: one at the request of Ecuador - to assess WTO compatibility of the revised EC regime - the other at the request of the US, to assess the level of nullification caused by the fact that the EC's implementing regulation was not in compliance with WTO provisions.

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161 Above n. 159, para. 6.3.
162 Para 3.57
163 WT/DSB/M/80 at para. 48; WT/DSB/M/59.
This issue came up in *US - Certain Measures*. In that case the EC argued that when it requested permission to retaliate, the US (acting unilaterally) had not exhausted the Article 21.5 procedures. The Panel noted that retaliation cannot be authorised by the DSB until the WTO has been able to assess whether retaliation was justified by the continuing nullification of benefits caused by the incompatible measures. Indeed, Article 21.5 DSU provides that in case of disagreement only a WTO adjudicating body can assess the compatibility of the implementing measure, but this determination can be performed by any WTO adjudicating body, including an arbitration panel such as the one pursuant to Article 22.6.¹⁶⁴

We note also that both Article 22.6 and the first sentence of Article 21.5 refer to the possibility of recourse to the original panel; there is only one original panel for each dispute. It is, therefore, not unreasonable to consider that the same original panel, through its arbitration procedure would, first, assess the WTO compatibility of the new measure, secondly, assess the impact, if any, of such WTO incompatible measure and thirdly determine the equivalent level of suspension of concessions or other obligations. We understand that such is the present practice of the DSB as it has developed under the DSU: the members of the original panel are mandated to act pursuant to Articles 21.5 and/or 22.6-22.7 of the DSU.¹⁶⁵ It is therefore

¹⁶⁴ *US - Certain Measures*, above n. 148, para. 6.122: "[I]f, at the time when the Article 22.6 arbitration is requested, no WTO determination of the compatibility of the implementing measure has yet taken place, those acting in arbitration are obliged to assess first whether the implementing measure nullifies or impairs the WTO rights of the Member requesting DSB permission to retaliate. This is a matter of simple legal logic: it is legally impossible to assess the level of suspension based on the level of nullification before assessing whether the implementing measure nullifies or impairs WTO rights. Only after having assessed the WTO compatibility of the implementing measure can a WTO adjudicating body assess the impact of any such WTO incompatibility, which will indicate the "equivalent level of suspension of concessions and other obligations". Since the Article 22.6 arbitration process was given the authority to determine "a level of suspension equivalent to the level of nullification", it has the authority to assess both variables of the equation, including whether the implementing measure nullifies any benefit and the level of such nullified benefits."

¹⁶⁵ [Original footnote] In the following cases, the DSB decided that the matter would be referred to the original panel under Article 21.5 of the DSU: (i) EC - Bananas III, Recourse to Article 21.5 by Ecuador (Communication dated 18 December 1998, WT/DS27/41), WT/DSB/M/53; (ii) EC - Bananas III, Recourse to Article 21.5 by the European Communities, WT/DSB/M/53; (iii) Australia - Salmon, Recourse to Article 21.5 by Canada (Communication dated 3 August 1999, WT/DS18/14), WT/DSB/M/66; (iv) Canada - Measures Affecting the Export of Civilian Aircraft, Recourse to Article 21.5 by Brazil (Communication dated 26 November 1999, WT/DS46/13), WT/DSB/M/72; (v) Brazil - Export Financing Programme for Aircraft, Recourse to Article 21.5 by Canada (Communication dated 23 November 1999, WT/DS70/9), WT/DSB/M/72; and (vi)
reasonable to interpret the DSU so as to allow a single WTO adjudication body to perform both the WTO compatibility determination of the implementing measure (Articles 21.5 and 23.2(a)) and the assessment of the appropriate level of suspension (pursuant to Article 22.6-22.7). 166

Thus the panel concluded that nothing in the DSU prevents parties from agreeing (and the DSB from authorising) that the arbitration panel, prior to assessing the level of nullification and impairment, first assess the WTO compatibility of the implementing measure. This panel report has yet to be appealed.

In EC - Bananas III, EC - Hormones and Brazil - Aircraft, arbitration on the proposed level of suspension of concessions (sanctions) was established pursuant to DSU Article 22.6. 167 Although the Article provides that an arbitration report is to be issued within sixty days, in practice there has not been strict adherence to this requirement 168

Finally, regarding the standard for evaluation of the level of nullification, Article 22.4 DSU provides that the level of suspension of concessions or

(footnote 165 cont) Australia - Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 by United States (Communication dated 4 October 1999, WT/DS126/8), WT/DSB/M/69. In those cases except for (ii) above, the Member invoking the procedure requested specifically that the matter be referred to the original panel. Also, in the following arbitration proceedings under Article 22.6, the original panel members were appointed as arbitrators: (i) EC - Bananas III, Recourse to Arbitration by European Communities under Article 22.6 of the DSU, WT/DSB/M/54; (ii) Australia - Salmon, Recourse to Arbitration by Australia under Article 22.6 of the DSU, WT/DSB/M/69; and (iii) Decision by the Arbitrators on EC - Hormones, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, op. cit., para. 2. In the case (i) above, the European Communities specifically requested that the original panel carry out the arbitration. Communication, dated 3 February 1999, from the European Communities to the Chairman of the DSB, WT/DS27/46.

166 Above n. 148, US - Certain Measures, paras. 6.122-6.123. Adjudication of both whether the implementing measure nullifies WTO rights and whether the level of suggested sanctions is equivalent to the level of nullification is a very burdensome exercise and may sometimes lead to delay in the issuance of the arbitration report. As noted by the Panel in US - Section 301, para. 7.180 and fn 720, as well as by the arbitration panel in Bananas III, fn 7, the 60-day period specified in Article 22.6 does not on its face limit or define the jurisdiction of arbitrators ratione temporis.

167 See, e.g., WT/DSB/M/65, 66, 78, 80, 81.

168 In the EC- Hormones dispute the arbitration was requested 2 June 1999, and the award was issued on 12 July 1999; in the EC - Bananas, the arbitration was requested 29 January 1999, and the award was issued on 6 April 1999; Brazil and Canada Aircraft: arbitration was requested 22 May 2000 and at this writing, no award has yet been issued.
obligations shall be "equivalent" to the level of nullification. Article XXIII GATT (1947) provided for an "appropriate" level of suspension of concession. Thus, the DSU standard appears to be more restrictive than that of the GATT, and is limited to actual levels of trade affected by the non-compatible measure.

U. Cross-retaliation

In principle, suspension of concessions should occur in the same sector as the WTO-inconsistent measure at issue in the panel case. This is the preferred option under Article 22.3 DSU. Only when this is not effective or practicable may concessions be suspended in a different sector covered by the same agreement. If, in turn, this is ineffective or impracticable, and the circumstances are serious enough, concessions may be suspended under another agreement, this is called "cross-retaliation", a concept borrowed from NAFTA. The Article 22.6 Arbitration of EC – Bananas III by Ecuador was the first case where WTO Arbitrators were asked to decide on a request for "cross-retaliation" and to interpret the principles and procedures set forth in Article 22.3 DSU, which are to be followed in the case of cross-retaliation. The implementing EC banana regime was found to be inconsistent with certain provisions of the GATT and the GATS, and Ecuador had requested cross-retaliation under the TRIPS Agreement with respect to the protection of industrial designs, geographical indications, and the protection of performers, producers of sound recordings and broadcasting organisations.

The Article 22.6 Arbitration panel in this case suggested that Ecuador could, in accordance with previous practice in arbitration proceedings under Article 22, submit another request to the DSB for authorisation of suspension of concessions consistent with the Arbitration Panel's conclusions. First, the Arbitrators concluded that at least part of the concessions suspended by Ecuador should fall under the GATT and the GATS. Such retaliation in goods and services would affect imports by Ecuador of consumer goods from the EC, as well as wholesale trade services and suppliers of EC origin. With respect to investment, primary goods,

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169 Article 22.3 DSU; see also Article 2019.3 of the North American Free-Trade Agreement.
170 WT/DS27/ARB/ECU.
171 Article 22.4 requires that the level of retaliation must be equivalent to the level of harm caused by WTO-inconsistent measures. Ecuador requested authorisation to retaliate against the EC in an amount up to US$450 million worth of trade. The Arbitrators calculated that the harm inflicted on Ecuador because of the WTO-inconsistent aspects of the EC banana regime amounts to US$201.6 million per year. In the 1999 US/EC Bananas arbitration, the harm caused to US was calculated to be US$191.4 million.
and all principal service sectors other than distribution services, the Arbitrators concluded that retaliation would not be practicable or effective for Ecuador.\textsuperscript{172} It is reported that the reason for this is, \textit{inter alia}, that Ecuador is a small developing country and the inequalities between Ecuador and the EC are great in many respects.\textsuperscript{173} It can be argued that the interpretation developed by the Arbitrators, and its application, aids in equalising the imbalance between small developing countries and major industrialised countries in the enforcement stage of the WTO dispute settlement mechanism. Developing countries were pleased with the outcome of that Arbitration Report.\textsuperscript{174}

\section*{V. Prohibition against unilateral measures}

Article 23 DSU is ground-breaking. It provides that any dispute relating to any WTO matter can be debated only in the WTO institutional framework. Pursuant to prohibitions contained in Article 23.1, no WTO violation justifies resort to a unilateral retaliatory measure by a Member. If Members disagree as to whether a WTO violation has occurred, the only remedy available to them to resolve this question is to initiate a DSU/WTO dispute process and obtain a WTO determination on the matter. This was made clear in \textit{US - Section 301}, as reported by the panel on \textit{US - Certain Measures}:\textsuperscript{175}

An important reason why Article 23 of the DSU must be interpreted with a view to prohibiting any form of unilateral action is because such unilateral actions threaten the stability and predictability of the multilateral trade system.... Unilateral actions are, therefore, contrary to the essence of the multilateral trade system of the WTO.... [unilateral actions] may prompt economic operators to change their commercial behaviour in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures. Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade....

\textsuperscript{172} Above n. 170, para. 173(b)-(c).

\textsuperscript{173} \textit{Ibid.}, para. 176.

\textsuperscript{174} See the Minutes of the DSB, WT/DSB/M/59.

The panel on US – Certain Measures went on to say:

The structure of Article 23 is that the first paragraph states the general prohibition or general obligation, i.e. when Members seek the redress of a WTO violation, they shall do so only through the DSU. This is a general obligation. Any attempt to seek “redress” can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the DSU. ... no WTO violation can justify a unilateral retaliatory measure by another Member; this is the object of the prohibitions contained in Article 23.1 of the DSU. If Members disagree as to whether a WTO violation has occurred, the only remedy available is to initiate a DSU/WTO dispute process and obtain a WTO determination that such a WTO violation has occurred. ... Delays in dispute settlement procedures can always happen. The fundamental obligation of Article 23 of the DSU would be a farce if every time there is a delay in a panel or arbitration process, the unsatisfied Member could simply unilaterally determine that a violation has occurred and unilaterally impose any remedy. (Emphasis added.)

W. Developing countries

The Dispute settlement mechanism of the WTO is crucial for developing countries. The DSU contains a number of provisions which take into account the specific interests of the developing and the least-developed countries. On the occasion of the 200th request for consultations the Director-General of the WTO stated that “Although no one can claim that the WTO’s dispute settlement system compensates for unequal economic power distribution in the world, it must be emphasized that this system gives small countries a fair chance, they otherwise would not have, to defend their rights.” Developing countries as a group have registered 50 of the 194 disputes, with India, Brazil, Mexico and Thailand playing the most active roles.

X. Transparency, de-restriction of documents, and the problem of translation of panel reports (descriptive sections)

The WTO Agreement contains multiple requirements of notification, publication and transparency. Article X GATT obligates Members to publish promptly any laws, regulations, judicial decisions, or other measures relating to GATT matters. Similar requirements relating to GATT matters. Similar requirements are established

176 Ibid., paras 6.17 and 6.135.
177 The problems encountered by developing countries are discussed in Chapter 6 below.
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in certain of the WTO multilateral trade agreements. Nevertheless, the WTO has frequently been criticised for lacking transparency. As a result of the Decision on Derestriction, adopted by the General Council on 18 July 1996, most documents are issued as unrestricted. However, there are some exceptions and delays are at times inevitable. Members have not yet been able to agree on the review exercise of this Derestriction decision.

NGOs and members of the private sector are asking for greater transparency of the panels and Appellate Body, who meet in closed sessions. As discussed above, each Member selects his representative to these proceedings, but WTO dispute settlement remains a government to government system. The confidentiality of panel submissions combined with demands for transparency in panel proceedings have led to the inclusion of very lengthy descriptions of the arguments of all parties in the panel report, which leads to enormous delays in translation of the reports. Once completed, the report is immediately issued to the parties to the dispute in the original language of the particular proceedings. The report remains confidential until it is circulated to all Members, which should, based on the DSU standard timeframe, take place within two to three weeks. However, because of the translation delays, three months often pass before circulation, with the consequence that Members not parties to the dispute do not have immediate access to the panel report. Since Article 15 DSU provides simply that the panel is to include a description of facts and arguments in its report - hence no requirement, nor even need, for the descriptive section to cover every minute detail of the facts and arguments presented by the parties - it is hoped that future panels will exercise restraint in the face of pressure from the parties seeking inclusion of such long descriptions.

178 See, e.g., Article 6 TRIMs Agreement, Article 12 Customs Valuation Agreement, Article 1.4 Import Licensing Agreement, GATS Article III, Article 2.9 TBT Agreement, Annex B SPS Agreement, Article 63 TRIPs Agreement, Article 3 Safeguards Agreement, Article 22 SCM Agreement, Article 12 of the Agreement on the Application of Article VI, Article 3.2 PSI Agreement and Article 3.2, Section B of the TPRM.

179 WT/L/160/Rev.1.

180 One solution to this problem was attempted in the dispute on US - 1916 Act (II) (request by Japan), WT/DS162, where the panel's findings were circulated without any descriptive part so that both panel reports could be appealed at the same time.
III. CONCLUSION

The dispute settlement mechanism of the WTO is arguably the most powerful and the fastest of all international dispute settlement systems. The WTO Agreement is, however, still too young for any objective or long term assessment of its dispute settlement mechanism. Many significant issues are still evolving. The enforcement of the disciplines of the WTO remains paramount to the viability of the WTO system as a whole. It is important to understand that most often substantive obligations of the WTO system are what NGOs and developing countries challenge, not the procedural stages of the WTO dispute settlement mechanism as such. In fact, the WTO dispute settlement system has so far enjoyed relative success, as evidenced by its frequent use and record for settlement and implementation of panels’ and the Appellate Body’s recommendations and rulings. This is particularly important in the context of trade in agriculture, as approximately one third of all cases have involved agricultural products as classified in the Harmonised System. However, enormous challenges do remain, as dissatisfied actors from a variety of national and societal backgrounds do not hesitate to remind us on a daily basis.

181 The AoA covers all products classified in the HS Code Section I through IV (except fish and fish products), and some products of HS Code Sections VI, VIII, and XI. See Annex I AoA.
Annex - The panel process

The various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consult each other in order to settle 'out of court'. At all stages the WTO Director-General is available to offer his good offices, to mediate or to help achieve a conciliation – Article 5.

NOTE: some specified times are maximums, others minimum; some binding, some not.

60 days
by 2nd DSB meeting
0-20 days
20 days (+10 if Director-General asked to pick panel)
60 days for panel report unless appealed
50 days for appellate report

Consultations - Article 4
Panel established by DSB (Article 6)
Panel examination (Normally 2 meetings with parties (Article 12)
1 meeting with third parties (Article 10)
Interim review stage
Descriptive panel report sent to parties for comments (Art. 15.1)
Interim report sent to panels for comments (Art. 15.7)
Panel report issued to parties (Article 12.5; Appendix 3 par 12(3))
Panel report issued to DSB (Article 12.5; Appendix 3 par 12(4))
DSB adopts panel/appellate report (including any changes to panel report made by appellate panel) (Articles 16.6, 16.8 and 17.14)
Appellate review (Articles 16.4 and 17.17)
Max. 30 days
60 days for panel report unless appealed
45 days for panel report

Implementation report by losing party of proposed implementation within reasonable period of time (Article 21.5)
Dispute over implementation: Proceeding possible, including referral to initial panel on implementation (Article 21.6)

Reasonable Period of Time: determined by: member proposes, DSB agrees or parties in dispute agree; or arbitrator (approx 15 months if by arbitrator)
In cases of non-implementation parties negotiate compensation pending full implementation (Art. 22.2)
Possibility of arbitration on level of suspension procedures and principles of retaliation (Articles 22.6 and 22.7)
Remedies if no agreement on compensation, DSB authorizes retaliation pending full implementation (Article 22)
Cross-retaliation: same sector, other sectors, other agreements (Article 22.3)