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1 General features of the WTO dispute settlement system

The WTO dispute settlement system is a rules-based system as opposed to a negotiation-conciliation-mediation type of dispute resolution mechanism. The system includes procedural steps that can be triggered by any WTO Member dissatisfied with another Member's measure considered to be inconsistent with any provision of the WTO Agreement. The system allows the dissatisfied Member to obtain a legal ruling by an independent adjudicative body on its rights and obligations under the relevant agreements. The dispute settlement system of the WTO is thus quasi-judicial: independent and autonomous bodies are responsible for adjudication of disputes although formally subject to the overall authority of the Dispute Settlement Body (DSB). The jurisdiction of the DSB and therefore that of the adjudicating bodies (i.e. panels and the Appellate Body) operating under its authority has been accepted by all WTO Members through their ratification of the WTO treaty. Thus, a WTO Member cannot refuse to participate in a WTO dispute settlement procedure if a complaint is brought against it.

The WTO dispute settlement system is quasi-automatic because it operates on the basis of 'reverse, or negative, consensus'. WTO-related disputes once triggered, the process can only be stopped with the consent of all parties to the dispute. Application of the principle of automaticity to the legal steps of the dispute settlement system has evolved from the early days of the General Agreement on Tariffs and Trade (GATT). Except in the very early years where GATT contracting parties voted on decisions of

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1 The views expressed are those of the author and do not represent a position, official or unofficial, of the WTO Secretariat or WTO Members.


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the CONTRACTING PARTIES.\(^2\) GATT dispute settlement operated on the basis of a positive consensus rule. Thus, a party against whom a complaint was brought could frustrate the operation of the system by blocking a consensus to establish a panel or to adopt a panel report. This began to change with approval of the Montreal Mid-Term Review decision (1989) to improve the dispute settlement process, which provided for greater automaticity in the establishment, terms of reference and composition of panels, so that such actions would no longer depend on the consent of the defending party in a dispute. Building on the Montreal decision, the Dispute Settlement Understanding (DSU) (1995) strengthened further the system by extending the automaticity principle to the adoption of panel and Appellate Body reports and to the retaliation process. The DSU codified the GATT/WTO dispute settlement system and provides for a series of legal stages which are automatic unless the Members agree otherwise by consensus. This is 'reverse, or negative, consensus' because consensus is needed to 'reverse or stop' the automaticity of the legal steps of the dispute settlement process. The system is also binding since WTO Members have agreed to adopt panel and Appellate Body reports automatically (through the application of the reverse consensus rules, as explained below).

The jurisdiction of the DSB is exclusive and limited: WTO-related disputes can only be litigated before WTO adjudicating bodies, and only WTO adjudicative bodies can decide if WTO violations exist. However, notwithstanding their significant power, while WTO adjudicating bodies can interpret the provisions of WTO agreements, they are explicitly prohibited from adding to or diminishing the rights and obligations of Members when assessing the WTO compatibility of the measures challenged. Moreover, the DSB may authorize sanctions in the case of non-compliance.

The DSU also put an end to any unilateral determination by a Member of whether a violation of any WTO provision has occurred. Article 23 of the DSU provides that any dispute relating to any WTO matter can be addressed only in the WTO institutional framework. Pursuant to Article 23.1 of the DSU, no alleged WTO violation justifies resort to a unilateral retaliatory measure by a Member. If a Member believes a WTO violation has occurred, the only recourse available to it to resolve this issue is to initiate a DSU/WTO dispute settlement process and to obtain a

\(^2\) Article XXV.5 of the GATT 1947 provides that 'where reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.'
WTO determination on the matter. The DSU thus requires WTO Members to resort to the dispute settlement system of the WTO to determine if: (1) a violation of the WTO agreements has been committed; (2) the implementing measure adopted by the losing Member to comply with the recommendations of panels or Appellate Body (endorsed by the DSU) is compatible with the rules of the WTO; and (3) the level of any sanctions is in fact proportionate or 'equivalent' to the loss of trade benefits caused by the WTO-incompatible measure.

The institutional structure of the system, which allows participation by all WTO Members in the various stages of the dispute resolution process either through the DSB or as a third party in a dispute, (even if in most cases the third parties to the dispute only have the right to make written and oral submissions, pose questions and comment on parties' submissions) makes the WTO dispute settlement system a truly multilateral system where independent and impartial individuals adjudicate on disputes between Members. This confirms the systemic interest of the entire WTO membership in WTO law, institutions and disputes.

2 Consultations

(a) The request for consultations

The DSU emphasizes the importance of consultations in dispute resolution, requiring a Member to enter into consultations within 30 days of such a request from another Member. The request for consultations is made in the form of a letter identifying the basic facts and legal claims; such request is sent from one Member to another and copied to the DSU and the WTO Secretariat. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. In addition, if the defending party does not respond to the request for consultations within ten days of the receipt of the request or if consultations are not held within 30 days of the receipt of the request, the complaining party may request the DSU to establish a panel.

(b) Right of third parties during the consultation process

Under the DSU, a third party requesting to join consultations must have a substantial trade interest. Moreover, the participation of such a third

Yerxa, Rufus (Editor); Wilson, Bruce (Editor). Key Issues in WTO Dispute Settlement: The First Ten Years. Cambridge, GBR: Cambridge University Press, 2005. p 71.
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party at the consultation stage is only possible if consultations were requested pursuant to Article XXII of GATT 1994, and is always subject to the acceptance of the defending party. If a defending party refuses the request of another Member to join in the consultations as a third party, such other Member may always initiate its own dispute settlement procedure for the same or a similar matter. Participation of a Member as third party during the consultation process does not provide that Member with any automatic right to participate as third party in the panel process.

3 The panel process

(a) Panel request

After the period of consultations, if the matter is not resolved, the complaining Member can request the DSB to establish a panel. Such request for the establishment of a panel must be made in writing. It must also 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; in case the applicant requests the establishment of a panel with other than standard terms of reference, the written request will include the proposed text of special terms of reference.

The mandate of the panel set forth in its 'terms of reference' is to provide a legal ruling on the claims of the complaining party contained in the panel request. The panel request is therefore crucial because it determines the 'matters' over which the panel has jurisdiction to rule.

A 'matter' is generally defined to include both the measure at issue and the claim(s) of violation.

(i) The measures at issue

This obligation to identify the measure and the legal basis of the complaint has been interpreted to mean that the complaining Member must specifically list all the measures being challenged and the specific WTO provisions that are claimed to be violated by each measure. Whether or not the 'specific measures at issue' can be said to be sufficiently identified in the Panel request will depend on whether the respondent is given proper opportunity to defend itself in light of the reference to the measure concerned. The respondent must be given adequate notice of the measure at issue.
On several occasions panels have had to make preliminary rulings on whether a claim made by a complaining party in its written and/or oral submissions was (properly) identified in the complainant’s panel request.

(ii) Claims: legal basis
Under the GATT, Article XXIII:1(a) recognized the right of any GATT contracting party to complain about a 'violation' of a provision of GATT by another contracting party. Article XXIII:1(b) and (c) also envisaged the possibility that a contracting party’s measure, action (or arguably its failure to act) or another 'situation' could still impair or nullify the benefits of another contracting party even if there was no violation. These are still the three bases for a complaint under the WTO dispute settlement system.

Violation complaints Article 4.2 of the DSU which is based on the language of Article XXIII:1 of the GATT 1994, provides that Members shall afford adequate opportunity for consultation regarding any representations made by another Member concerning 'measures affecting the operation of any covered agreement' taken within the territory of the former. Thus, a claim that a measure is 'affecting' or restricting the trade of another Member contrary to any provision of any covered agreement suffices to trigger the DSU mechanism. Article 6.2 of the DSU also requires the complaining Member specifically to identify the WTO provisions at issue, the violation of which affect that Member's trade.

Non-violation complaints The purpose of the GATT/WTO dispute settlement system is to ensure respect of the rights and obligations of the Members relating to their market access commitments and market competitive opportunities, including tariff concessions and related disciplines. In this context, Article XXIII:1(b) of the GATT allowed a party to challenge any measure that, although not in breach of the GATT 1947, had the effect of undermining the balance of rights and obligations inherent in the GATT ('non-violation nullification or impairment'). Under the GATT,

7 Article XXIII:1 of GATT: 'If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation.'

Yerxa, Rufus (Editor); Wilson, Bruce (Editor). Key Issues in WTO Dispute Settlement: The First Ten Years. Cambridge, GBR: Cambridge University Press, 2005, p 73.
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there were 13 non-violation cases addressed by panels, but only four panel reports containing conclusions on non-violation claims were eventually adopted. Under the GATT, the concept of non-violation nullification or impairment was mainly used when an otherwise GATT-consistent domestic subsidy was provided in an unexpected manner in favour of domestic goods for which tariff concessions had been negotiated. The complaining party had to prove that the subsidy measure in question was 'unreasonable' because a tariff concession had been negotiated on the relevant products and that such subsidy 'nullified or impaired' benefits accruing to the competing importing product because the value of the tariff concession had been diminished.

Under Article 26 of the DSU, non-violation claims have been further regulated. Article 26 of the DSU applies when the provisions of Article XXIII:1(b) of the GATT 1994 are applicable to a covered agreement. In other words, unless explicitly excluded, non-violation claims are possible for any measures under any of the agreements of Annex 1A of the WTO Agreement (covering trade in goods). There are special provisions for non-violation claims under the TRIPS Agreement and the GATS.

**Situation complaints** Article XXIII:1(c) of the GATT 1994 and Article 26.2 of the DSU provide for so-called 'situation' complaints, which have never been interpreted by either a GATT panel or a WTO panel. Some have argued that these situation complaints could be used for actions by the private sector of a Member that could not be imputed directly to the government; others believe that situation complaints could be used to avoid the argument that the situation could not have been reasonably expected. There are no situation complaints under the GATS.

(b) *Presumed economic and legal interest*

WTO jurisprudence is clear that a complainant does not have to demonstrate any specific legal or economic interest in order to initiate WTO dispute settlement proceedings. All WTO Members are presumed to have the necessary legal and economic interests when any Member considers that its trade interests have been adversely affected by another Member's measure. Therefore, the allegations contained in the panel requests suffice to trigger the WTO dispute settlement system, and such allegations will constitute the basis of the panel's mandate and terms of reference.

*Yerxa, Rufus (Editor); Wilson, Bruce (Editor). Key Issues in WTO Dispute Settlement: The First Ten Years. Cambridge, GBR: Cambridge University Press, 2005, p 74.*

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(c) Establishment of panels

Where a dispute is not settled through consultations, the DSU requires the establishment of a panel, at the latest, at the DSB meeting following that at which a request is initially made, unless the DSB decides by consensus against establishment. Therefore, unless there is consensus not to establish a panel that has been requested, reverse consensus will operate so that a panel will automatically be established by no later than the second DSB meeting at which the panel has been requested.

Article 9 of the DSU encourages multiple complaints related to the same matter to be examined by a single panel 'whenever feasible'. The single panel should organize its examination and present its findings to the DSB in such a manner that the rights that the parties to the dispute would have enjoyed had separate panels examined the complaints, are in no way impaired. With regard to multiple complaints, the provisions of the DSU are more detailed due in part to the extensive membership of the WTO.

(d) Mandate of panels – terms of reference

Under the DSU, panels usually have standard terms of reference, unless the parties to the dispute agree otherwise within 20 days from the date of establishment of the panel. The practice of the DSB, so far, has been to refer, in the standard terms of reference, to the document in which the complaining party(ies) has(ve) requested the establishment of the panel, and to leave it to the panel to decide on any jurisdictional issue, the applicable law and whether adequate consultations have taken place before the establishment of a panel.

Under the DSU, the jurisdiction of panels is therefore determined with reference to the claims of violation listed by the complaining party in its panel request, as discussed above.

(c) Selection of panelists

(i) Choosing panelists

Once a panel has been established, the parties, with the assistance of the WTO Secretariat, will proceed to the selection of panelists. Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. Citizens of WTO Members whose governments are parties or third parties to the dispute cannot, unless the...
parties to the dispute agree otherwise, serve as panelists for that dispute.
The process is usually initiated by the WTO Secretariat, which suggests
names of possible panelists. To ensure the selection of qualified individuals
and to facilitate the selection of panelists, the Members have established
an "indicative list" containing the names of potential governmental and
non-governmental panelists recommended by WTO Members. Panelists
do not have to be selected from the indicative list, but the list has been
especially useful as a source of expertise for the new more specialized
agreements under the WTO (e.g. TRIPS Agreement, GATS). Both parties
have to agree on each of the three panelists. If parties do not agree on
the three panelists, either party (but usually the complaining party) can
request the Director-General of the WTO to nominate such panelists. The
Director-General will only nominate the number of panelists that have
not already been agreed by the parties. In practice, the Director-General
has been called on to select panelists, either in whole or in part, in just
over half the disputes.

(ii) Rules of conduct

The NAFTA Code of Conduct served as the basis for the US proposal for
a WTO Code of Conduct for individuals involved in WTO dispute settle-
ment. The US proposal was submitted to the GATT contracting parties on
9 November 1994, during the work of the Preparatory Committee for the
WTO. The DSU itself also includes provisions referring to the obligations
of panelists, such as maintaining the confidentiality of the proceedings
and deliberations (in Articles 14.1, 17.10 and 18.2); and, the necessity
for panels to make objective assessments which presupposes some inde-
pendence and the impartiality of panelists (Article 11 of the DSU, also
mentioned in Articles 8.2 and 8.9). However, the DSU does not contain
any disclosure obligation (concerning conflicts of interest) nor any chal-
lenge procedure to allow parties to contest a panelist who might have a
conflict of interest. Such an obligation now exists in the DSU Rules of
Conduct.

The new DSU Rules of Conduct now cover three groups: (1) panelists
(exerts, arbitrators); (2) the Appellate Body members (and its support
staff); and (3) WTO Secretariat staff. Those covered persons5 are required
to be independent and impartial, to avoid direct or indirect conflicts

4 WTDSB/182.
5 A covered person includes: (a) Appellate Body Members and staff; (b) panel members,
experts and arbitrators; and (c) WTO staff assisting on panels.
of interest, and to maintain confidentiality. To ensure respect for these obligations, each covered person must: (1) respect the provisions of the DSU; (2) disclose anything that may cause a party to question that person’s independence or impartiality; and (3) avoid conflict of interest.

Once panelists have been selected and the terms of reference have been determined, the panel is deemed 'composed' and can proceed to its organizational meeting.

\(\textbf{f) Organizational meeting and timetable}\)

Within a week of the panel’s composition, the panel will usually meet with the parties to discuss the organization of its work. After these consultations with the parties, the panel will finalize its procedures and its timetable on the basis of the DSU and its Annexes, and the parties’ comments.

\(\textbf{g) Panel procedure and timetable}\)

Basic panel procedures and timetable are set out in the DSU and in its annex 3, although panels are free to modify these procedures as they deem appropriate, after consultations with the parties.

\(\textbf{i) Confidentiality}\)

Deliberations of the panel and documents submitted to it are confidential, but nothing in the DSU precludes a party to a dispute from disclosing statements of its own positions to the public. Members must treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it must also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

\(\textbf{ii) Rules of procedure}\)

As noted above, the standard rules of procedures are those contained in the DSU regarding the dispute process together with those contained in Appendix 3 to the DSU. Under the DSU, each panel must adopt its rules of procedure but the DSU sets out maximum, minimum and standard time-limits within which various legal steps must be performed. Most panels' rules of procedure now contain provisions on preliminary rulings; on experts, if relevant; on notification; and on any other matter relevant
to the specific dispute. More recently, some panels have annexed their working procedures to their final report.

(iii) Use of experts

The idea of using a 'group of experts' in panel proceedings was introduced into the DSU negotiations in November 1993, apparently in response to concerns of US environmentalists. The procedure was borrowed from NAFTA. Article 13.2 and Appendix 4 of the DSU provide that each panel has the right to seek information and technical advice from any individual or body it deems appropriate. Article 13.1 provides that panels also 'may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter'. Certain agreements (Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)) encourage or even require that experts be consulted in dispute settlement proceedings.

In practice, panels have not used the procedure for expert groups but rather have resorted to individual experts. 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 environmental protection defense under Article XX of the GATT 1994, though at times they have been called upon in other situations.7

A panel may, in fact, need additional information in order to evaluate evidence already before it in the course of determining whether the claiming or the defending Member, as the case may be, has established a prima facie case or defense. However, panels cannot use their investigating powers under Article 13 of the DSU to 'make the case for the complaining party'.8

It is also on the basis of Article 13 of the DSU that panels may consider unsolicited amicus curiae briefs received from non-parties to a dispute.

2 Experts were also used for instance in the Panels on US—Shrimp, Japan—Agricultural Products II; Australia—Salmon, and Japan—Film.
8 See Appellate Body Report on Japan—Agricultural Products II, para. 129.
(iv) Rights of third parties

Under the DSU, Members that have a 'substantial interest' in a matter before a panel and that have notified their interest to the DSU can become third parties. In practice a systemic interest suffices to constitute a substantial interest. Therefore, contrary to the situation at the consultation stage, third parties at the panel stage do not need to have a specific trade interest in the dispute or the consent of the respondent in order to participate as a third party. Third parties receive the first submissions of the parties, can make written submissions and are given an opportunity to participate in the first meeting of the panel — there is usually a special session for third parties during the first meeting of the panel with the parties, where they can make oral submissions to the panel. Although third parties generally are not given the right to attend the second panel meeting, some panels have provided enhanced third party rights in special circumstances.

Only those Members that have been third parties during the panel process can become third parties before the Appellate Body. Third parties that have notified the DSU of their substantial interest in the matter, and that comply with the rules of procedure of the Appellate Body, can become third parties in a dispute before the Appellate Body.

(h) Exchange of the written submissions

Before the first substantive meeting of the panel with the parties, the panel receives written submissions from the parties in which they present the facts of the case and their arguments. Parties will exchange their first set of written submissions in a sequential manner according to the timetable determined at the organizational meeting. After the first panel meeting, parties will then exchange simultaneous rebuttals (second written submissions). Unless otherwise indicated, written submissions are confidential but any Member may request a non-confidential summary of a party's written submission to a panel.

(i) Hearings before the panel

(i) Oral presentations by the parties (and third parties)

At the first substantive panel meeting, the complaining party will present its evidence and legal arguments orally. It will usually submit a written copy of its oral statement which often contains the complaining party's first response to the first submission of the defending party. Subsequently,
and still at the same meeting, the defending party will present its views. All third parties in the dispute will also be invited to present their views at the first substantive meeting of the panel during a session set aside for that purpose.

After responding to the panel’s questions at the first meeting and filing their written rebuttals (second written submissions), the parties will meet with the panel for a second time. At the second meeting (which usually takes place four to six weeks after the first meeting), the defending party will usually take the floor first, followed by the complaining party.

(ii) Questions by the panel and the parties

Traditionally, panels ask both factual and legal questions of the parties and third parties. Parties are invited to respond orally and are also given time to respond in writing in the days following the panel meeting. Indeed, between the first and the second meeting, parties will usually have to answer numerous questions posed by the panel as well as submitting their written rebuttals. As already mentioned above, Article 13 of the DSU also 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. But in all cases panels must respect due process and cannot set aside the rules on allocation of the burden of proof.

(iii) Burden of proof

Neither the DSU nor the Working Procedures for panels contained in Appendix 3 of the DSU make reference to the burden of proof on parties to a dispute.9 Referring to the general practice of international tribunals, the Appellate Body addressed the issue at length in US – Wool Shirts and Blouses10, where it stated:11

"[I]t 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 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 . . . ."

11 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, p. 16, DSU 1996:1, at 16.
It is important to remember that the significant investigative authority given to panels under Article 13 of the DSU cannot be used by a panel to rule in favour of a complaining party that has not established a prima facie case of WTO-inconsistency based on specific legal claims asserted by it. 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, but only to help it to understand and evaluate the evidence submitted and the arguments made by the parties and not to make the case for a complaining party.

(iv) Legal interpretation by the panel

Article 3.2 of the DSU mandates the use by panels and the Appellate Body of customary principles of interpretation of public international law in the determination of the WTO rights and obligations of parties to a dispute. Panels and the Appellate Body must also respect customary rules of international law when interpreting WTO provisions. In its first report, the Appellate Body stated: 'The GATT is not to be read in clinical isolation from public international law.' A subsequent early case, the Appellate Body also stated that certain general principles of international law such as good faith, due process, rules on the burden of proof and the right 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.

(v) 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 of the 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.' The Anti-Dumping Agreement contains a distinct though not entirely different standard of review in Article 17.6, but for all other cases the standard of review in Article 11 of the DSU is to be applied.

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12 Appellate Body Report on Australia - Salmon, para. 129.
14 See Panel Report on Korea - Procurement: '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.
(vi) Participation of private lawyers
In general, a Member that is 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:16

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

(j) Issuance of the descriptive part of the panel report
Usually within four weeks after its second meeting, the panel will issue the draft descriptive part of its report, to which parties are invited to make comments within two weeks. The panel will then take into account the suggestions by the parties and modify its descriptive part accordingly.

(k) Issuance of the panel's interim report
Subsequently, the panel will issue an interim panel report, including the revised descriptive part and the interim findings and conclusions of the panel on the legal issues. Again the panel will invite the parties' comments on this interim report. Parties are also entitled to request another meeting with the panel. A practice has developed whereby the parties forego their right to a review hearing with the panel, in exchange for the opportunity to submit a second set of comments on the written comments provided by the other party in the interim panel report.

Subsequently, the final report of the panel will be issued to the parties before it is translated into the two other official languages of the WTO (usually Spanish and French since the working language of almost every panel is English) and then circulated to all Members.19

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(i) Conclusions of a panel report

Panel and Appellate Body reports will identify specific WTO violations where they are found to exist but leave to sovereign WTO Members the flexibility, during a reasonable period of time, to rectify the WTO-violative governmental measure(s) in a WTO-compatible manner. It has been argued that Article 19 of the DSU limits the scope of remedies available to a panel once it concludes 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.'

In practice, panel and Appellate Body reports usually contain one general recommendation, which usually reads: '... recommends that the DSB request such Member to bring its measure(s) into conformity with the covered Agreements mentioned above'.

(ii) Suggestions by the panel

In addition to its recommendations, the DSU panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. But these suggestions are only suggested ways in which a Member 'could' decide to implement. It is, however, possible for parties to a WTO dispute to agree on any form of compensation to resolve the matter.

(iii) Non-violation claims

Under Article 26.1(b) of the DSU, the standard remedy for non-violation claims is compensation (usually, by providing increased market access by reducing tariffs for other products) since panels cannot recommend that the losing party withdraw the measure in question or bring the contested law into conformity with the WTO as the measure or law is already WTO compatible.

(iv) Judicial economy

Even though a complaining party is required to list all of the claims it wishes to have examined in its request for the establishment of a panel, the panel is under no obligation to examine and reach a finding on each and
every listed claim. Rather, it may exercise judicial economy by declining to rule on successive claims after it has found WTO violations in response to one or more claims. The Appellate Body in Australia – Salmon, stated:17

"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."

However, a panel’s decision to exercise judicial economy and not to address certain claims may result in the Appellate Body deciding, after overturning some of the panel’s legal findings, to adjudicate on claims that were not addressed in the panel report by a technique known as ‘completing the analysis’.

(m) Duration of the panel process

It is envisaged that a panel should normally complete its work within six to nine months or, in cases of urgency, within three months.18 If a panel cannot complete its work within nine months from its establishment, it must notify the DSB accordingly. Most panels usually take around nine months from the date of their composition to complete their work.

(n) Adoption of the panel report

After the final panel report is issued to the parties, it will be translated into the three official languages of the WTO (English, Spanish and French) before it is circulated to all Members. Article 16 of the DSU provides that the panel report, if not appealed within 60 days following its circulation to WTO Members, must be adopted unless Members, by consensus, decide not to do so. However, a panel report cannot be considered for adoption during the first 20 days after its circulation to WTO Members. Members having objections to a panel report must give written reasons for their objections at least ten days prior to the DSB meeting at which the panel report will be considered. The virtually automatic adoption of DSU panel reports is considered a dramatic change from GATT practice. The

18 Articles 12.8 and 20 of the DSU.
Members' decision to make adoption virtually automatic was balanced by the creation of an appellate process to ensure that contested or controversial legal findings in panel reports could be reviewed and possibly reversed or modified, before they were given legal effect.

(o) Developing countries

The DSU contains a number of provisions which take into account the specific interests of developing and least-developed countries.39 One such provision is Article 27, which allows developing countries to request the Secretariat to provide them with the services of legal experts. This provision has been used with growing frequency by developing countries which are now actively involved in most WTO panels, either as parties or third parties. Their participation in the WTO dispute settlement system is remarkable when compared with the old GATT, where disputes usually involved only developed countries.

(p) Alternative dispute resolution

Article 5 of the DSU provides that the good offices of the Director-General of the WTO, conciliation or mediation may be requested at any time by any party to a dispute. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds. For this reason, there is an explicit provision that requires the confidentiality of any particular position taken by the parties during these good offices, conciliation or mediation.

In addition, Article 25 of the DSU provides for arbitration as an alternative means of dispute resolution.20 Such arbitration procedure must be mutually agreed between the parties and notified to the DSB; it is not subject to appeal to the Appellate Body but remains subject to the provisions on implementation and suspension of concessions and obligations (Articles 21 and 22 of the DSU).

19 Article 27 and various provisions throughout the DSU.
20 This type of arbitration is to be distinguished from the arbitration that may take place in the context of the surveillance, implementation and retaliation process under the DSU.