

# ABC of WTO's Dispute Settlement



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Monographs on Globalisation and India –  
*Myths and Realities*, #11

#0701

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## *Preface*

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Dispute settlement is at the heart of the World Trade Organisation (WTO) system, and has worked pretty effectively so far. In fact, it is one aspect of the WTO which ensures egalitarianism in the multilateral trading system (MTS) benefiting poor countries, as much as the rich. Indeed, costs of entering into the dispute settlement arena are pretty steep, but that by itself cannot be termed as being unfair to the poor countries.

Since September, 2001, CUTS has been publishing reader-friendly booklets on several aspects of globalisation, trade and investment. This is the eleventh in the series, while more are yet to come. The purpose is to help the busy and the uninitiated in understanding the issues easily.

The WTO's dispute settlement mechanism is widely seen as one of the most critical features of the new trade regime ushered in by the Uruguay Round of Trade Negotiations. Using this mechanism, WTO Members can shine the spotlight of international legal scrutiny on the protectionist practices of their trading partners. This system of rule-of-law is especially important for developing countries, which typically lack the market size to exert much influence through more power-oriented trade diplomacy.

The dispute settlement mechanism at the WTO, unlike the General Agreement on Tariffs and Trade (GATT) system, is much more legalistic, time-bound, predictable, consistent and, thus, binding in nature. The provisions of appeal, negative consensus and cross-retaliation are some of the major improvements over the old system. In other words, it is based on adjudicatory model, unlike the negotiation-based model as in the past.

This monograph focuses on the dispute settlement mechanism, which came into force with the establishment of the WTO in 1995. It gives all 149 Members of the WTO confidence that the agreements negotiated and agreed will be respected. It does not impose new obligations, but it does aim to enforce those already agreed.

An introduction and basics on the development of WTO's procedure for adjudicating trade disputes between member countries is presented by this monograph. This will help to introduce the WTO dispute settlement systems, which have become the most frequently used mechanisms for the settlement of disputes among governments.

By providing a multilateral forum for settling disputes, the mechanism guards weaker WTO Members against unilateral action by the strongest. This system enables to solve disputes, avoiding 'trade wars'.

In the course of the first decade of the existence of the WTO, this mechanism has shown itself to be the foundation upon which the stable base of the organisation rests. In essence, the Dispute Settlement Understanding (DSU) created a system of binding dispute settlement based on rules and procedures.

The operation of the DSU is strengthened by rules of conduct designed to maintain the integrity, impartiality and confidentiality of proceedings conducted and thereby enabling confidence in dispute settlement mechanism.

The DSU mechanism established with procedures and rules to solve disputes between the WTO Members has unquestionably added to the stability and positively influenced the performance of the international trading system.

**Jaipur**  
**January 2007**

**Pradeep S. Mehta**  
**Secretary General**

# 1



## What is the Purpose of Dispute Settlement Understanding?

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One of the key texts that emerged from the Uruguay Round<sup>1</sup> is the “Understanding on Rules and Procedures Governing the Settlement of Disputes” – called the DSU. In principle, the DSU has been proclaimed as the most important pillar of the WTO<sup>2</sup> and its rules-based system. In fact, the supposed benefits of such an effective dispute settlement system were one of the main persuasive factors for several developing countries to agree to the Uruguay Round agreements.

In principle, trade disputes arise from time to time concerning the interpretation and implementation of the rules contained in the WTO Agreements and how they are being applied by the WTO Members. The rationale behind the DSU is to provide Members with a clear legal framework for solving disputes. The WTO’s procedure for resolving trade disputes under DSU is vital for enforcing the rules, and therefore, for ensuring that trade flows smoothly. The dispute settlement system of the WTO is a central element in providing security and predictability to the MTS.

In practice, a dispute arises when a WTO Member believes that another Member is violating an agreement or a commitment that it has made in the WTO. The ultimate responsibility for settling disputes lies with WTO Members themselves, however, through the Dispute Settlement Body (DSB). One element that sets the WTO apart from most other international organisations is the fact that its Members have given themselves clear and well established procedures to enforce the rules they have negotiated and settle disputes among themselves.

### **Box 1: WTO Agreements**

The WTO Agreements cover goods, services and intellectual property. They spell out the principles of liberalisation, and the permitted exceptions. Agreements include individual countries' commitments to lower customs tariffs and other trade barriers, and to open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries. Besides, they require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted, and through regular reports by the Secretariat on countries' trade policies. These Agreements are often called the WTO's trade rules, and the WTO is often described as 'rules-based', system. But it is important to remember that the rules are actually agreements that governments have negotiated.

*Source: [www.wto.org](http://www.wto.org)*

The primary goal of dispute settlement is to ensure national compliance with multilateral trade rules. The DSU contains a number of provisions that aim to take into account the specific interests of the developing and the least developed countries (LDCs). It also provides some special rules for the resolution of disputes, which do not involve a violation of obligations under a covered agreement but where a Member believes nevertheless that benefits accrued by the WTO Agreements are being nullified or impaired i.e. a non-violation of a WTO Agreement.



## 2



### **What is DSB and How Does it Work?**

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Settling disputes is the responsibility of the DSB (the General Council in another guise), which consists of all WTO Members. The DSB has the sole authority to establish ‘panels’ of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorise retaliation when a Member does not comply with a ruling.

DSB encourages its members to make the best possible efforts to bring the disputed measure in the dispute into compliance with the panel ruling within a ‘reasonable period of time’ (Box 3) established by the parties to the dispute. Subsequently, if a Member does not comply with the rulings, the DSB can authorise the complainant to suspend commitments and concessions to the violating Member. In general, complainants are encouraged to suspend concessions with respect to the same sector as the subject of the dispute; however, if complainants find this ineffective or impracticable, they may suspend concessions in other sectors of the same Agreement or even under separate Agreements. Ecuador, for example, suspended its Trade-Related Aspects of Intellectual Property Rights (TRIPs) commitments to the European Union (EU), in retaliation against the latter’s non-compliance with panel rulings in the goods-based Banana dispute.

One fundamental element of the WTO is that each Member country must have the right to redress in cases where its trading interests are nullified or impaired, for example, through an illegal measure taken by another Member country. This is guaranteed in the DSB of the WTO, which was considerably

improved in the Uruguay Round. It is important to note that only Members of the WTO have access to this system, whereas other countries and private parties (exporters, importers or other persons) cannot directly approach the WTO. The complaint of the private parties must be channelled through their respective governments, and each government will carefully examine the facts and evidences put forward by the private parties before deciding whether to bring the case to the WTO or not.

### 3



## **How to Initiate Any Action Against a Dispute under the DSB?**

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**There are two types of complaints which are as follows:**

1. *Violation Complaints.* This kind of complaints occur when one Member (or a number of Members), the complainant(s), claim(s) that another Member, the respondent, has taken a measure inconsistent with specific WTO rules, that causes injury of the complainant(s).
2. *Non-Violation Complaints.* In this kind of complaints, a Member may bring a complaint even if there has been no violation of a WTO Agreement. It may allege that another Member has taken a measure that nullifies or impairs a benefit that the complaining Member had reason to expect to receive under the provisions of a WTO Agreement.

Any WTO Member that considers a benefit accruing to it under the WTO Agreement is being impaired or nullified through measures taken by another WTO Member may request consultations with that Member. The WTO Members are required to accord 'sympathetic consideration' and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered WTO Agreement taken within the territory of the former. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member, which requests consultations. Any request for consultations should be submitted in writing and the reasons for the request should be mentioned, including the identification of the measure(s) at issue and legal basis for the complaint.

The dispute settlement process can be completed within approximately 14 months from the date of a request for consultations, including an appeal. The division of this time period is explained in Box 2.

### **Box 2: Procedural Deadlines**

For prompt settlement of disputes under the WTO, following strict and short deadlines are set out in the Agreement:

- **60 days** for the holding of **consultations** (**20 days** in cases of urgency, including those concerning perishable goods);
- **20 days** for the **composition and terms of reference of a panel** from the date of its establishment by the DSB;
- **six months** for the **submission of panel reports** under normal circumstances (**three months** in case of urgency), with a maximum of **nine months**;
- in cases of no appeal, **60 days** for the **adoption of panel reports** by the DSB;
- in cases of appeal, **60 days for the submission of the report by the Appellate Body** and **30 days for its adoption by the DSB**;
- **30 days** to inform the DSB concerning **implementation** of a panel or Appellate Body report.

# 4



## **What is the Process of Consultation?**

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Consultation process is the first stage for solving disputes under the DSB. When a Member believes that another party has taken an action that impairs 'benefits accruing to it directly or indirectly' under the WTO Agreements it may request consultations to resolve the conflict through informal negotiations. Before taking any other action, the countries in dispute have to negotiate with each other to see if they can settle their differences by themselves. If the negotiation fails, then they can ask the WTO Director-General to mediate or seek his help in any other way.

However, if consultations fail to yield mutually acceptable outcomes after 60 days, Members may request the establishment of a panel to resolve the dispute.

Parties to the dispute have discretion regarding the manner in which consultations are to be conducted. The DSU provides a few rules on the conduct of consultations process, which is essentially a political-diplomatic process and they are without prejudice to the rights of any Member in further legal proceedings.

Unless otherwise agreed, a Member must *reply* a request for consultation within 10 days after the date of its receipt and enter into consultations within a period of no more than 30 days after the date of receipt of the request. Moreover, the Member must enter into consultations in good faith and with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period

otherwise mutually agreed, then the Member that requested the consultations may proceed directly to request the establishment of a panel.

While the request for consultations is notified to the DSB, the consultations between the WTO Members themselves are confidential. Generally, consultations are held in Geneva and involve Geneva-based diplomats as well as trade officials of the parties to the dispute. The WTO Secretariat is not present at, and is in no other way involved with, the consultations.

If the Members to the dispute reach any solution they must ensure that all mutually agreed solutions are:

1. consistent with the WTO Agreements and shall not nullify or impair benefits accruing to any Member under these Agreements, nor impede the attainment of any objective of those agreements; and
2. notified the DSB and the relevant Councils and Committees. Other Members may raise any point relating to the solutions reached in the DSB or other relevant WTO bodies. The requirement to notify a mutually agreed solution is, however, often not respected.

If the consultations between the parties fail to settle the dispute within 60 days of the receipt of the request for consultations, the complainant may request the DSB to establish a panel to adjudicate the dispute. The complainant may request to establish a panel within 60-days period if the consulting parties jointly consider that consultations have failed to settle the dispute. In many cases, however, the complaining party will not, immediately upon the expiration of the 60-day period, request the establishment of a panel, but will allow for considerably more time to settle the dispute through consultations. For consultations involving a measure taken by a developing country Member, the DSU explicitly provides that the parties may agree to extend the 60-day period. If after the 60-day period has elapsed, and the consulting parties would not agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend this period and, if so, for how long. To date, the Chairman of the DSB has never been called upon to exercise this authority.

In dispute settlement cases involving an LDC Member, where a satisfactory solution has not been found in the course of consultations, the Director-General of the WTO or the Chairman of the DSB shall, upon request by an LDC Member, offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. An LDC has never been a complainant or respondent in a WTO dispute till date.

# 5



## **How is a Panel Established? What is the Structure of a Panel?**

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A request for a panel marks the real beginning of the legal process of dispute settlement as envisaged by the DSU. This is the second stage of the DSB process. In this stage, if consultations fail, the complaining country can ask for a panel to be appointed. The panel needs to be appointed within 45 days and would be dissolved within six months of its establishment. The country on trial or under intense scrutiny can block the creation of a panel once, but when the DSB meets for a second time, the appointment can no longer be blocked unless there is a consensus among the 149 WTO Members against appointing the panel.

The DSU provides that panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. There have been a number of disputes in which a mutually agreed solution was reached while the dispute was already before a panel.

Panels are like tribunals, which normally consist of three persons from different countries who examine the evidence and decide who is right and who is wrong, but the parties to the dispute may agree to five panellists. But unlike in a normal tribunal, the panellists are usually chosen in consultation with the countries in dispute. Only if the two sides cannot agree the WTO Director-General does appoint them.

Panellists, who serve in their individual capacities, for each case can be chosen from a permanent list of well-qualified candidates, or from elsewhere. They cannot receive instructions from any government.

The panellists hear the evidence and present a report to the DSB recommending a course of action to be taken within six months. However, in cases of urgency, including those concerning perishable goods, the deadline is shortened to three months. The panel can solicit information and technical advice from any relevant source, albeit it is not required to do so. Only submissions from Members are guaranteed to be heard, although in rare cases, panels have consulted submissions from interested non-governmental organisations (NGOs). Third-party Members may also involve themselves in the dispute settlement process. All deliberations and communications are confidential, and only the final panel reports become part of the public record.

Officially, a panel helps the DSB to make rulings or recommendations. But because the panel's report can only be rejected by consensus in the DSB, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited.

The DSU describes in some detail how the panels are to work. The main stages are:

- *Before the first hearing* – Each side in the dispute presents its case in writing to the panel.
- *First hearing-the case for the complainant(s) and defendant* – The complaining Member(s), the responding Member, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.
- *Rebuttals* – The countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- *Experts* – If one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
- *First draft* – The panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.
- *Interim report* – The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
- *Review* – The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.
- *Final report* – A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO Agreement or an obligation, it recommends that the measure be made to conform to the WTO rules. The



panel may suggest how this could be done. Whenever the DSB meets to consider the report, the parties to the dispute can participate in such a meeting as a matter of right and their views are to be recorded accordingly.

- *The report becomes a ruling* – Once panel reports have been prepared, they are presented to the DSB, which either adopts the report or decides by consensus not to accept it. Alternatively, if one of the parties involved decides to appeal the decision, the report will not be considered for adoption until the completion of the appeal. Both sides can appeal the report (and in some cases both sides do).

## 6



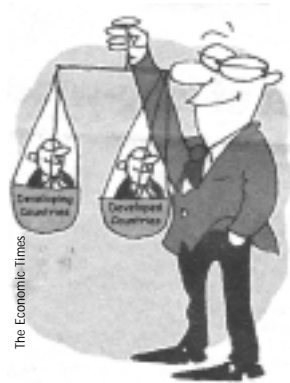
### **How can the Decision of a Panel be Challenged?**

An appeal by either side, or even both sides, against the Panel Report will lead to the establishment of a three person Appellate Body. The Appellate Body of the WTO is a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by the WTO Members. Members of the Appellate Body have four-year terms. They have to be individuals with recognised expertise in the field of international trade and law, with no affiliation to any government.

Appeals have to be based on points of law such as legal interpretation – they cannot re-examine existing evidence or examine new issues. As such, the appeal is to be limited to ‘issues of law’ covered in the panel report. An appeal can only be made by the parties to the dispute and not by third parties, even if they have substantial interest in the dispute.

The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, however Appellate Body reports, once adopted by the DSB, must be accepted by the parties to the dispute.

The appeal can uphold, modify or reverse the panel’s legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. An Appellate Body report is adopted unconditionally unless the DSB votes by consensus not to accept its findings within 30 days of circulation to the membership. Rejection is only possible by consensus.



## How Does the DSB Enforce the Law? What Are the Options for Disputants? Do Developing Countries Get Fair Treatment in Cases of Disputes with Larger Trading Nations?

Once the DSB has decided on the case, i.e., whether the complaint was shown to be right or wrong, it may direct the ‘losing’ Member to take action to bring its laws, regulations or policies into compliance with the WTO Agreements. This is the only direction that emerges from a WTO dispute. There is no concept of ‘punishment’. The DSB will give the losing party a ‘reasonable period of time’ in which to restore the conformity of its disputed measure(s).

If the losing party fails to restore the conformity of its laws within the ‘reasonable period of time’ (see Box 3), the DSB may – on an exceptional basis – authorise a successful complainant to take retaliatory measures to induce action against the losing party. This is very rare. Almost all WTO Members ‘voluntarily’ implement DSB decisions in time. Of course, when a losing country brings its laws etc., into conformity it may choose how to do so. Indeed, it may not necessarily make the changes that the winning party would prefer.

The DSB uses a special decision procedure known as ‘reverse consensus’ or ‘consensus against’ that makes it almost certain that the panel recommendations in a dispute will be accepted. The process requires that the recommendations of the panel (as amended by the Appellate Body) should be adopted ‘unless’ there is a consensus of the WTO Members against adoption. Such a consensus has never happened, and because the nation ‘winning’ under the Panel’s ruling

would have to join this reverse consensus, it is difficult to conceive of how it ever could. The DSB has the basic principle according to which it acknowledges the rule of one vote, one count method i.e. each Member has the equal right irrespective of whether it is a developed or developing country.

The losing Member of the dispute must follow the recommendations of the panel report or the Appellate Body report. It must state its intention to do so at a DSB meeting held within 30 days of the report's adoption. If compliance with the recommendation immediately proves impractical, the Member will be given a 'reasonable period of time' to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually acceptable compensation, for instance, tariff reductions in areas of particular interest to the complaining side.

If the losing party to the dispute fails to comply with the recommendation, then the prevailing party, first of all, will ask the former to enter a negotiation with them to come out with a scheme of compensation. If agreement on compensation is not reached within 20 days after expiration of the period for implementing the panel or Appellate Body decision, a party may request the DSB to authorise retaliation (suspension of concessions).

The complainant may ask the DSB for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side as a form of retaliation. The DSB must grant this authorisation within 30 days of the expiry of the 'reasonable period of time' unless there is a consensus against the request.

**Box 3: Determination of the Reasonable Period of Time under the DSU**

The DSU provides three ways to determine the 'reasonable period', including:

- the period of time proposed by the Member concerned and approved by the DSB; or
- if the DSB does not approve, then the period which is mutually agreed by the parties to the dispute; or
- in the absence of any mutual agreement, the period of time determined through binding arbitration.

As a general rule, the time period from the date of establishment of the panel until the date of determination of the reasonable period should not exceed 15 months.

In principle, a complaining country must first consider taking retaliatory action (trade sanctions)<sup>3</sup> in the sector affected by the measure in question. If this is not practical or if it would not be effective, the sanctions can be imposed on different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another sector. The objective is to minimise the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

However, this restriction on trade must be at an equal level to the loss incurred by the prevailing party. A country applying for compensation in a trade dispute must follow three steps:

- it must first see if it can restrict imports of the same product involved in the dispute (i.e. restrict steel for steel);
- if this is not possible, it must see if it can take action against a different product, but one that is covered by the same agreement in the GATT i.e. restrict iron for steel;
- if neither of these options is 'practicable or effective' it can take action against imports of any product i.e. restrict wheat for steel.

The last two options come under cross-retaliation. It is a more important issue for developing countries, than it is for developed countries. This is for two reasons:

- the difference in the type of goods traded between developed countries, on one side, and between developing countries, on the other; and
- the relatively limited number of goods exported by developing countries as compared to that of developed countries.

Developing countries have, in the context of the WTO dispute settlement mechanism, the same rights as other countries. The growing number of complaints brought by them against developed and developing countries evidences the faith of developing countries in the system. In addition, the mechanism contains the following special elements to facilitate the task for developing countries:

- in cases between a developing and a developed country, the panel – upon request by the former – includes at least one panellist from another developing country;
- panel reports must explicitly indicate how provisions on differential and more favourable treatment for the developing party in the dispute have been taken into account; and
- upon request, the WTO secretariat can make a qualified legal expert available to any developing country to provide legal advice and assistance.

#### **Box 4: US Faces New Threat of EU Trade Sanctions**

In 2003, the WTO DSB authorised EU to impose up to US\$4bn worth of sanctions on certain American-made exports to Europe, the biggest ever sanctions in WTO history.

The WTO Appellate Body backed EU condemnation of US federal tax subsidies for exporters in the so-called Foreign Sales Corporation Dispute. The WTO Panel had adjudicated that US had not gone far enough in eliminating huge tax breaks for many exporters, rejecting a US appeal of an earlier ruling that declared certain US corporate tax benefits an illegal export subsidy. Further, the Panel found that Washington had failed to fully repeal the Foreign Sales Corporation Law in 2004.

After the WTO decision was announced, it was mentioned that EU would not accept a system of tax benefits, which give US exporters, including Microsoft and Boeing, an unfair advantage via illegal tax breaks, against their European competitors.

The ruling is a significant development in the continuing dispute between Washington and Brussels over foreign sales corporation taxes.

In February 2006, the EU warned that it might continue to impose the US\$4bn worth of sanctions on a range of products from US exporters. And US had a few months to act to avoid the re-imposition of retaliatory measures, since the Appellate Body report has to be adopted within 30 days time and the US needed 60 days to bring its legislation into line with its WTO obligations.

In any case, the DSB monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

Members have voiced differing views on the topic of the dispute settlement system, although all seem to favour the 'no harm' idea.

### Box 5: Legal Remedies at WTO: Too Little Too Late

First, no damages were awarded for harm caused in the past. For instance, US did not have to compensate anyone for the 21 months' lifespan of the WTO-inconsistent steel safeguard. This loophole offers a clear incentive for hit-and-run practices where countries enact protectionism, knowing it is illegal, but realise also that they can get away with it – 'for free' – for at least as long as it takes to complete dispute settlement proceedings.

Second, once the WTO has made its final ruling and on an average one-year time period to implement such ruling has lapsed (during none of which any compensation is owed), trade sanctions can, indeed, be imposed. In safeguard disputes, such as the steel case, retaliation is permitted even *before* that, namely directly after the WTO has issued its final ruling (another factor that may have prompted earlier implementation in that case). However, although a threat of retaliation *by EU* may be both real and harmful even for a country like US, if and when the threat comes from, for example, Egypt or Thailand, it may not even reach the ear of the US President. Put differently, although trade sanctions – in essence the only legal remedy available at the WTO – may (sometimes) work for powerful complainants, it is unlikely to work for smaller players. On the contrary, rather than putting pressure on the violating country, when a small player retaliates it is more likely to harm *its own* economy (higher input and consumer prices) as well as *its own* political interests (think of the risk of being cut-off from foreign assistance).

Third, in addition to the absence of retroactive remedies and the often unpalatable nature of trade sanctions, the *amount* of retaliation that the WTO can authorise is capped at the equivalent of the trade kept out by the original violation, in this case, the continued imposition of the WTO illegal safeguard. This is nothing more than a simple tit-for-tat or zero-sum game where, in principle, no more pressure is put on the violating country (by the trade sanction) than on the victim (by the original violation).

Given these deficiencies, one may ask why the WTO Members still comply with 90 percent of WTO rulings and, in particular, why developing countries have rarely faced the problem of non-implementation. The answer is most likely that it is not the *legal* remedies, nor the *economic* pressure exerted by trade sanctions that induces countries to behave. Rather, it is the *political* pressure of peer review, example setting and shunning *internationally*, at WTO meetings, and the *domestic* political pressure, from both sectors harmed by the original violation e.g. steel consumers in the steel dispute.

Source: <http://jurist.law.pitt.edu/forum/Pauwelyn1.php>

# 8



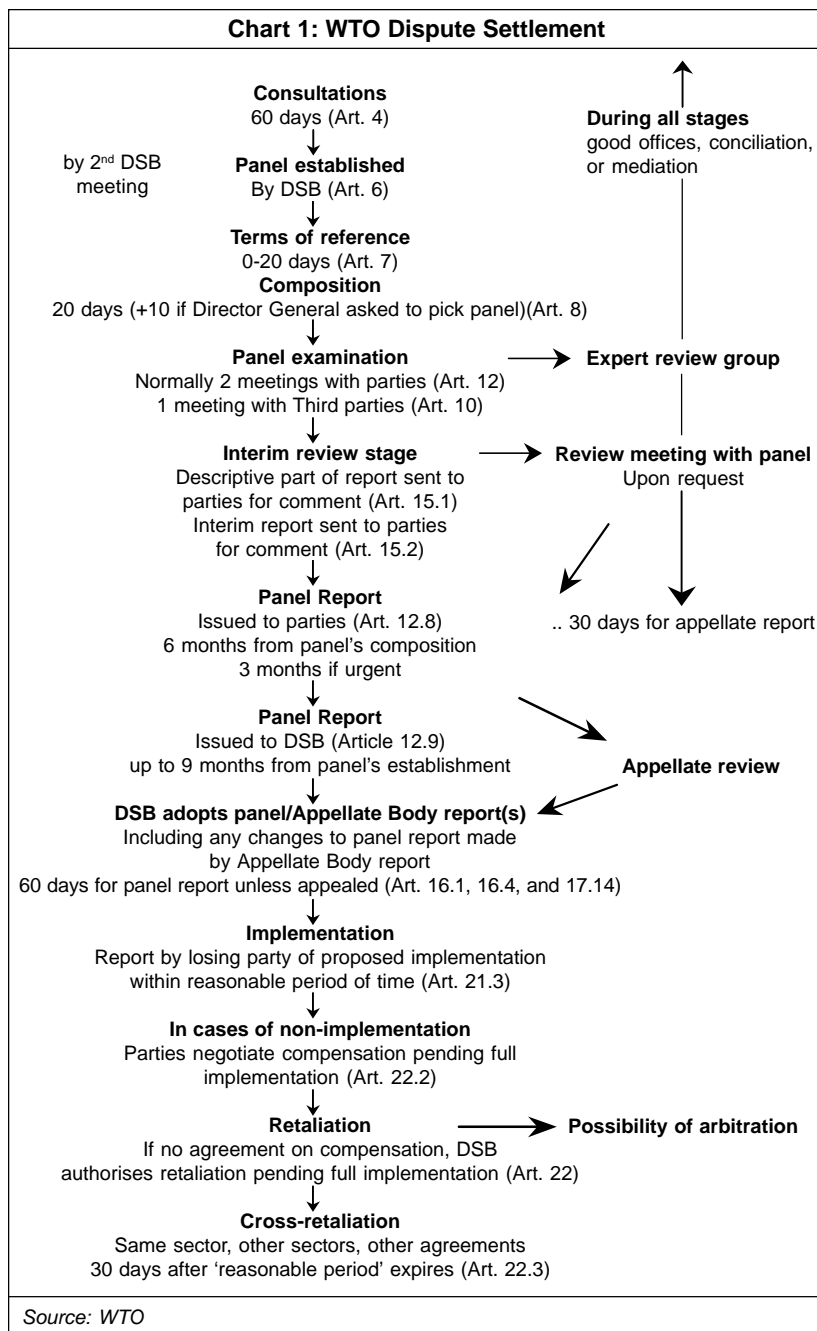
## What Happens when the Retaliatory Measure itself is Disputed?

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As an alternative means of dispute settlement, Members may seek arbitration within the WTO in situations where the issues in conflict are ‘clearly defined’ by both parties to a dispute. The parties must agree to arbitration and the procedures to be followed. Where the parties decide to arbitrate, they must agree to abide by the arbitration award. All Members must be given prior notice of the arbitration. Third parties may join the arbitration only with the consent of the parties that have agreed to arbitration.

The arbitration should complete within 60 days of the expiry of the reasonable period. A *status quo* has to be maintained during the course of the arbitration. The arbitrator’s decision will be final and binding on the parties. After the decision is adopted by the DSB, it will authorise the prevailing party to retaliate in conformity with the same.





# 9



## How Many Cases Have Been Taken to DSB and Decided?

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In the first eight and a half years of the operation of the WTO dispute settlement system i.e., from January 1995 to June 2004, Members filed 295 requests for consultations to the WTO. In 124 out of those 295 disputes, or in 42 percent of the cases, a developing country Member was the complainant. Since 2000, developing countries Members have been the complainants in nearly two thirds of all complaints (69 out of 110). In one year, i.e. 2001, developing country Members filed three quarters of all requests for consultations.

The DSB established 110 panels between January 1995 and June 2003, which shows that consultations are often able to settle the disputes and with more number of cases it can be said that Member countries have gained more confidence in DSB. In the same period, the DSB adopted 71 panel reports and 47 Appellate Body reports. While the parties appealed nearly every single panel report in the early years of the dispute settlement system, the appeal rate has significantly decreased over the past few years.

The annual number of requests for consultations peaked in 1997 with 50 requests, then fell to 40 in 1998 and, since then, have fluctuated between 23 and 37. The agreements under these disputes most frequently invoked by complainants has been the GATT 1994. In a distant second place are the Subsidies and Countervailing Measures (SCM) Agreement, the Agreement on Agriculture (AoA) and the Anti-Dumping Agreement (ADA). So far, the TRIPs Agreement and the General Agreement on Trade in Services (GATS)

have rarely been invoked as the basis of a dispute. Very often, complainants invoke more than one agreement in their request for consultations.

<b>Table 1: Cases Taken to the WTO's Dispute Settlement System</b>	
<b>Stage</b>	<b>Number of cases (1995-2003)</b>
Consultation	295
Panel	110
Appellate Body	47
<i>Source: www.wto.org</i>	



### **What are the Costs to Use the WTO Dispute Settlement Procedure?**

There are no costs for the parties to a dispute in the WTO. Any such costs are borne by the general WTO budget. However, because of growing complexity of many cases, governments are increasingly seeking the assistance of specialised private law firms of major developed countries, for example, in the area of anti-dumping, which charge relatively high fees, and which must be borne by the government concerned.

The developing countries would, therefore, not be as prompt and willing to initiate the dispute settlement process for exercising their rights, as would a developed country. Hence, there is a basic imbalance in rights and obligations between a developing country and a developed country, because of a vast differential between the capacities of these two sets of countries to invoke the enforcement process.

For the case of WTO trade litigation, a legal services centre for developing countries – the Advisory Centre on WTO Law (ACWL) – was established in Geneva in 2001, to provide legal advice on WTO law, support in WTO dispute settlement proceedings and training in WTO law to LDCs, developing countries and customs territories, including countries with economies in transition.

The ACWL charges are shown in Table-2. As of September 2005, 11 law firms and four individuals had registered to offer their services through the

ACWL. Country governments have access to the legal services provided by the ACWL, which can advise clients in need of assistance only once they arrive and request it. Exporters and trade industry associations cannot approach ACWL directly as the format allows only country governments to seek legal assistance from them. Thus, exporters and trade industry must first convince their government that it is worth proceeding to the ACWL<sup>4</sup>.

<b>Table 2: Time Budget for Legal Assistance to the Complainant in a WTO Dispute Settlement Proceeding</b>			
(Value in Swiss Francs charged on hourly basis)			
<b>Stage</b>	<b>Degree of complexity</b>		
	Low	Medium	High
Consultations	43	80	127
Panel	143	256	411
Appellate Body	71	108	168
<b>Total</b>	<b>257</b>	<b>444</b>	<b>706</b>
<i>Source: Advisory Centre on WTO Law: Billing Policy and Revised Time Budget</i>			

Legal fees in developed countries range from US\$200-1000 per hour. *Taking a conservative estimate of attorney fees in trade litigation cases at a billable rate of US\$350 per hour, one estimate of the average number of hours indicates that the bill for hourly legal services could run from US\$89,950 for a “low” complexity DSU case to US\$247,100 for a “high” complexity case (ACWL, 2004). Nevertheless, these fees would not include the cost of litigation support through necessary data collection, economic analysis and hiring of expert witnesses for testimony, which may lead to another US\$100,000 to US\$200,000. Furthermore, there are also substantial overhead costs to the actual litigation process associated with travel, accommodation, communication, paralegal and secretarial assistance. Given market rates, a “litigation only” bill of US\$500,000 to an exporter for a market access case is likely to be fairly typical. However, this would include neither the resources necessary to investigate potential claims in the pre-litigation phase, nor the resources necessary to engage public relations and/or political lobbying in the post-litigation phase to generate compliance.*

High-income members of the ACWL – who do not have access to the legal services provided by the Centre – have made substantial contributions to the Endowment Fund. Developed countries that have each contributed US\$1mn or more to the Endowment Fund include Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden and UK.



## Can Civil Society Organisations/NGOs Influence or Play a Role in Dispute between Two Members?

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Chances for consultation and cooperation with non-governmental organisations (NGOs) could arise in all three branches of the WTO i.e. the legislative, the executive and the judiciary. Not only have NGOs tried to influence WTO policies, but also they have sought to change the operating procedures of the WTO, advocating a democratisation of the organisation by giving citizens increased access to and influence in its proceedings and decisions.

NGOs are the most influential groups of non-state actors (NSAs) in the international legal field. At present, NGOs are not allowed direct access to the WTO dispute settlement system, meaning that they have no standing before the adjudicating bodies. However, there is a possibility for their indirect participation through *Amicus curiae*<sup>5</sup> (friend of the court). The Appellate Body of the WTO has held that NGOs are permitted to file *Amicus curiae* submissions to both panels and the Appellate Body.

*Amicus* briefs<sup>6</sup> are a general practice of legal discourse and are accepted in all types of legal systems all over the world, be they civil or common law systems. In some systems, there are no formal rules and the matter is left exclusively to the discretion of the court.

The filing of *Amicus curiae* briefs as such hardly constitutes a major role for NGOs, since it is within the discretion of a panel or the Appellate Body whether

or not to accept the briefs. Still, it is a first step towards formal and direct participation in the real workings of the WTO.

**Box 6: Shrimp-Turtle dispute**

The issue of the *Amicus* briefs has become a contentious one in the context of the WTO dispute settlement process ever since the so-called Shrimp-Turtle case. The panel received two briefs from the NGOs in the course of proceeding of the Shrimp-Turtle case. The first was jointly submitted by the Centre for Marine Conservation (CMC), US and the Centre for International Environment Law (CIEL), US and the second was submitted by World Wild Life for Nature (WWF). Because of the importance of the case to global environmental management, *Amicus* briefs were submitted by three coalitions of NGOs, which were concerned about environmental issues. The complaining parties e.g. India, Malaysia, Thailand and Pakistan requested the panel not to consider the contents of the briefs, while US urged the panel to avail itself of the contained information.

The panel, in this case, declined to accept the unsolicited briefs. However, the Appellate Body, reversing the stand of the panel, decided that the submissions, though unsolicited, were part of government submissions, which are admissible.

Thus, strictly speaking, it cannot be said that the Appellate Body accepted any *Amicus* brief in the Shrimp-Turtle case, as the information provided by the NGOs was received only as part of government submissions and not as *Amicus* briefs as such.

*Source: www.wto.org*

### Box 7: Asbestos Dispute

The controversy over the participation of NGOs in trade disputes reached a climax in Asbestos Dispute. Canada challenged measures of the European Communities (EC) prohibiting asbestos and product containing asbestos; it later appealed the panel ruling that France's ban on the sale and use of asbestos was justified on public health grounds.

The panel had received four Amicus briefs from the NGOs (Collegium Ramazzini, Ban Asbestos Network, Instituto Mexicano de Fibro-Industrias A.C., American Federation of Labour and Congress of Industrial Organisations) two of which it had taken into account, since the EC included these two briefs in its own submissions. Without giving a reason, it had decided not to take into consideration the two other briefs.

The Appellate Body has ruled the following so far on the Amicus curiae issue:

- Panels can accept non-requested briefs; however, they are under no legal duty to take the content of the briefs into consideration for their findings.
- The Appellate Body, on the other hand, has the legal authority to accept briefs; such briefs can be requested, if the Appellate Body exercises its authority to formally invite briefs.

*Source: [www.intlaw.univie.ac.at/fileadmin/user\\_upload/int\\_beziehungen/Internetpubl/Brandstetter.pdf](http://www.intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/Brandstetter.pdf)*

The approach of the Appellate Body with respect to the admissibility of *Amicus* briefs has shown its selective nature, albeit a shift in perception has been observed. If the practice in cases from the Shrimp-Turtle to the Asbestos Dispute case is looked into, we may find that the Appellate Body has liberalised its views towards the admissibility of the briefs. In the first instance, the Appellate Body only entertained briefs that were submitted as part of a government submission, and declared such submissions to be an integral part of the government submission. A more liberalised approach was taken in the course of the Asbestos Dispute case, whereby the Appellate Body, though it did not entertain any of the independently submitted briefs, proceeded a little forward to set up an procedure for the acceptance and consideration of *Amicus Curiae* briefs.

The suggestion that NGOs should take part in the process through their national governments will not serve any purpose. This will work only when NGOs have views that are similar to those of their national governments.





## **What are the Proposals for Reform of the Dispute Settlement System? What are the Difficulties Faced by Negotiators to Reach a Successful Conclusion?**

There have been various proposals submitted by various countries for the reforms in different articles of Dispute Settlement Mechanism. These proposals to reform DSU can be summarised in the following manner:

- It was proposed to extend the time period of compliance with DSB recommendations and rulings in order to help the dispute settlement system provide mutually satisfactory solutions to disputes. It was also proposed that compulsory provision on special and differential treatment (S&DT), be made more effective and authorise developing countries, when they suspend concessions to a developed country, also to take into account the impact on their economies and not only the level of nullification or impairment. (*Ecuador's proposal*)
- It was proposed to attempt clarification between provisions of non-compliance, and provisions of retaliation rules. (*Australia's proposal*)

It was suggested to put forward the provisions enhancing third parties' access to information and knowledge in the dispute settlement system. Whereas, the current DSU regime only allows third parties to be present at the first substantive review stage, it was proposed that third parties would be entitled to join the proceedings up to the interim review stage. However, they would

be excluded from the portions of the meetings where confidential information is presented. (*Costa Rica, EC and Jamaica's proposal*)

- Proposal to expand transparency and public access to the WTO dispute settlement proceedings. The proposal would open the WTO dispute settlement proceedings to the public for the first time and give greater public access to briefs and panel reports. To expand transparency in WTO disputes includes the following provisions:
  1. Open hearings – The public could observe all substantive panel, Appellate Body and arbitration meetings, except those portions dealing with confidential information;
  2. Timely access to submissions – All briefs and hearing statements would be made public, except those portions dealing with confidential information;
  3. Timely access to final panel reports – Final panel reports would be made available to WTO members and the public once the reports are issued to the parties; and
  4. *Amicus curiae* submissions – Consideration of guidelines to establish procedures for the handling of *Amicus* submissions. (*US proposal*).
- *China* proposed the introduction of a quantitative limitation on the number of complaints per year that countries could bring against a particular developing country.
- *Brazil* proposed introducing a fast track panel procedure.

The difficulties faced by negotiators so far in their attempts to reach a successful conclusion of the DSU review negotiations may be for the following reasons:

- The consensus requirement for any change to the DSU sets high hurdles;
- Key decisions of the adjudicative bodies and members' experience with the system have created controversial views on specific aspects of the system that have become increasingly difficult to bridge (for e.g. on issues such as transparency, *Amicus* briefs, collective retaliation);
- Some problems of the DSU review may be explained with difficulties of negotiating reforms to a system that is constantly in use: Negotiating positions are subject to permanent change as Members continuously gather new experience due to new cases and new reports; and
- Despite criticism, there seems to be a general sense of satisfaction with the system.

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## References

1. [www.wto.org](http://www.wto.org)
2. [www.unctad.org](http://www.unctad.org)
3. Data from WTO DSU database overview
4. <http://en.wikipedia.org>
5. “*WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*” Chad Bown, Bernard Hoekman, May 2005

## *Endnotes*

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- 1 *The eighth round of GATT negotiations began at Punta del Este in Uruguay. This is why it is known as the Uruguay Round.*
- 2 *The WTO is a permanent inter-governmental body governing and regulating international trade in goods and services. It lays parameters for the conduct of international trade.*
- 3 *Trade sanctions are trade penalties imposed by one or more countries on one or more other countries. Typically the sanctions take the form of import tariffs (duties), licensing schemes or other administrative hurdles. They tend to arise in the context of an unresolved trade or policy dispute, such as a disagreement about the fairness of some policy affecting international trade (imports or exports).*
- 4 *The ACWL's basic mission is to ensure that these Members of the WTO have a full understanding of their rights and obligations under WTO law and an equal opportunity to represent effectively their interests in WTO dispute settlement procedures.*
- 5 *Amicus curiae is a Latin term, which means friend of the court and represents a legal principle. It refers to a party that is allowed to provide information to the court voluntarily, in the form of a legal brief, even though the party is not directly involved in the case at hand. The person or the body appointed (either by the court or by application to the court) is known as the Amicus curiae, and the brief submitted is known as Amicus brief.*
- 6 *Amicus curiae brief brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favoured.*

## *Glossary of Terms under WTO*

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**Articles (of the GATT):** Clauses of the General Agreement that lay out the rules and procedures that Contracting Parties will observe in their conduct of international trade and trade policy. Each of the 38 Articles in the GATT deals with a different aspect of trade. The GATT is now known as the WTO.

**Accession:** The process of a country becoming a member of an international agreement, such as the WTO. Negotiations determine the specific obligations a nonmember country must meet before it is entitled to full WTO membership benefits.

**Consultations:** Discussions between two WTO members for the purpose of avoiding or resolving a trade dispute.

**Developing countries:** Countries whose economies are mostly dependent on agriculture and primary resources and do not have a strong industrial base. The term is often used synonymously with less developed countries and underdeveloped countries. In the WTO, developing country status is by self-designation and includes, for agricultural products, countries such as Korea, Israel, and Singapore. The least developed countries are a subset of developing countries.

**Retaliation:** An action taken by one country against another for imposing a tariff or other trade barrier. Forms of retaliation include imposing a higher tariff, import restrictions, or withdrawal of previously agreed upon trade concessions. Under the WTO, restrictive trade action by one country entitles the harmed nation to take counteraction.

**Special and differential treatment:** A principle allowing developing countries to have lesser reduction commitments than developed countries. In the Uruguay Round, disciplines applying to developing and LDCs were less stringent than those applying to developed countries.

**Subsidy:** A direct or indirect benefit granted by a government for the production or distribution (including export) of a good. Examples include any national tax rebate on exports; financial assistance on preferential terms; financial assistance for operating losses; assumption of costs of production, processing, or distribution; a differential export tax or duty exemption; domestic consumption quota; or other methods of ensuring the availability of raw materials at artificially low prices. Subsidies are usually granted for activities considered to be in the public interest.

**Tariff:** A tax imposed on imports by a government. A tariff may be either a fixed charge per unit of product imported (specific tariff) or a fixed percentage of value (*ad valorem* tariff).

**Trade barriers:** Regulations used by governments to restrict imports from, and exports to, other countries. Examples include tariffs, nontariff barriers, embargoes, and import quotas.

**Unfair trade practices:** Actions by a government or firms that result in competitive advantages in international trade. Such actions include export subsidies, dumping, boycotts, or discriminatory shipping arrangements. Under US Section 301, the President is required to take appropriate action, including retaliation, to obtain removal of policies or actions by a foreign government that violate an international agreement or are unjustifiable, unreasonable, or discriminatory, and burden or restrict US commerce.

**US Trade Representative (USTR):** Cabinet-level head of the Office of the US Trade Representative, the principal trade policy agency of the US Government. The US Trade Representative is also the chief US delegate and negotiator at all major trade talks and negotiations. The USTR is part of the Executive Office of the President.

**WTO Panel:** A group composed of neutral representatives that may be established by the WTO Secretariat under the dispute settlement provisions of the WTO. The WTO panel reviews the facts of a dispute and renders findings of WTO law and recommends action.

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*pp 31, #0416, Rs.50/US\$10, ISBN 81-8257-032-8*

**7. WTO Agreement on Textiles and Clothing – Frequently Asked Questions #7**

The WTO Agreement on Textiles and Clothing (ATC) is a complex one. This monograph attempts to address some of the basic questions and concerns relating to textiles and clothing. The aim is to equip the reader to understand the fundamentals of and underlying issues pertaining to trade in textiles and clothing.

*pp 34, #0419, Rs.50/US\$10, ISBN 81-8257-035-2*

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*pp 44, #0426, Rs 50/US\$10, ISBN: 81-8257-043-3*

**9. Globalisation and Small Scale Industry: Frequently Asked Questions #9**

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Negotiations on Trade Facilitation (TF) was incorporated as the major modality of negotiation under July 2006 Package of the Doha Round. This monograph is an attempt to educate the reader and build the fundamental foundation for the understanding of the basic issues concerning TF under GATT.

*pp 30, #0613, Rs 50/US\$10, ISBN: 81-8257-078-6*





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