

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.2 Panels



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## NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

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## WHAT YOU WILL LEARN

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The *Understanding on Rules and Procedures for the Settlement of Disputes* (the “DSU”) of the World Trade Organization (the “WTO”) provides for several methods to resolve disputes that arise between WTO Members concerning their rights and obligations under the *WTO Agreement*. Of these dispute settlement methods, the most frequently used is adjudication by *ad hoc* panels and the Appellate Body. This Module gives an overview of the process of adjudication by the *ad hoc* panels, i.e., the panel process, and focuses on the process of adjudication by the Appellate Body, i.e., the appellate review process.

Since adjudication by panels must always be preceded by consultations between the parties to the dispute, the first Section of this Module addresses this preliminary consultation process and examines the object and purpose of consultations, the consultation procedure and the outcome of consultations. The second Section of this Module examines the establishment and composition of the *ad hoc* panels that may hear and decide disputes after unsuccessful consultations. The third Section on “The Mandate of a Panel” discusses the terms of reference of these panels and the standard of review applied by them. It also addresses the issues of judicial activism and judicial economy by panels, the rules of conduct applicable to panelists and the role of the WTO Secretariat. The fourth Section on “Special Features of Panel Proceedings” examines the access to panel proceedings, the confidentiality of the proceedings, and the rules of interpretation as well as the rules on evidence applied by panels. The fifth Section, which is entitled “The Panel Proceedings”, deals with the working procedures for panels and the time frame for the panel proceedings, and explains the various steps in the panel proceedings. Finally, this Module addresses, in a sixth Section, the use made by developing country Members of consultations and the panel process and highlights the DSU rules providing for special and differential treatment for developing country Members in this context.

# 1. CONSULTATIONS

## Objectives

**On completion of this section, the reader will be able to appraise why it is important that recourse to adjudication by a panel is preceded by consultations between the parties to the dispute, how these consultations are conducted and what the result of these consultations may be.**

## 1.1 Object and Purpose

### Article 3.7 DSU

The aim of the WTO dispute settlement system is to secure a *positive* solution to a dispute. The DSU expresses a clear preference for solutions mutually acceptable to the parties to the dispute, rather than solutions resulting from adjudication by a panel. Therefore, each panel process must be preceded by consultations between the complaining and responding parties to the dispute with a view to reaching a mutually agreed solution. The DSU provides that in the course of consultations and before resorting to further action, Members should attempt to obtain satisfactory adjustment of the matter. The DSU requires that Members engage in consultations in good faith in an effort to resolve the dispute amicably before the dispute can be referred to a panel.

### Article 4.5 DSU

### Article 3.10 DSU

To resolve disputes through consultations is obviously cheaper and more satisfactory for the long-term trade relations with the other party of the dispute than adjudication by a panel. The consultations enable the disputing parties to understand better the factual situation and the legal claims in respect of the dispute. Such understanding may allow them to resolve the matter without further proceedings and, if not, will allow a party to learn more about the facts and the legal arguments that the other party is likely to use when the dispute goes to adjudication. In this respect, the consultations may serve as an informal pre-trial discovery mechanism. Their primary object and purpose, however, is to settle the dispute amicably.

## 1.2 The Consultation Procedure

### 1.2.1 Request for Consultations

### Article 4.2 DSU

Any WTO Member that considers that a benefit accruing to it under the *WTO Agreement* is being impaired or nullified by measures taken by another WTO Member may request consultations with that other Member. WTO Members are required to accord “sympathetic consideration” to and 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. All such requests for consultations shall be notified to the Dispute Settlement Body (the “DSB”) and the relevant Councils and Committees by the Member, which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons

### Article 4.4 DSU

for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

### **1.2.2 Consultation Process**

#### **Article 4.6 DSU**

Parties have broad discretion as regards the manner in which consultations are to be conducted. The DSU provides few rules on the conduct of consultations. The consultation process is essentially a political-diplomatic process. Consultations are without prejudice to the rights of any Member in further legal proceedings. During consultations Members “should” give special attention to the particular problems and interests of developing country Members.

#### **Article 4.10 DSU**

#### **Article 4.3 DSU**

Unless otherwise agreed, the Member to which a request for consultation is made must *reply* to the request 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. It 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.

#### **Article 4.6 DSU**

While the request for consultations is notified to the DSB, the consultations themselves are confidential. Generally, consultations are held in Geneva and involve Geneva-based diplomats as well as capital-based 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.

#### **Articles XXII and XXIII GATT 1994**

Consultations can be requested either pursuant to Article XXII of the GATT 1994, or the corresponding provisions in other covered agreements, or pursuant to Article XXIII of the GATT 1994, or the corresponding provisions in other covered agreements. The Member requesting consultations is free to choose either type of consultations. There is only one, albeit significant, difference between these two types of consultations. Only in the context of consultations pursuant to Article XXII, or corresponding provisions, can a Member other than the consulting Members be allowed to participate in the consultations. A Member that considers that it has a substantial trade interest may notify the consulting Members and the DSB of such interest within 10 days after the date of the circulation of the request for consultations. Provided that the responding party to the dispute agrees that the claim of substantial interest is well founded, this Member shall be joined in the consultations. If consultations are conducted pursuant to Article XXIII, or corresponding provisions, it is not possible for other Members to join in the consultations.

#### **Article 4.11 DSU**

#### **Article 5 DSU**

During the consultations, the parties may agree to request good offices, conciliation or mediation provided for in Article 5 of the DSU. The Director-General of the WTO may, acting in an *ex officio* capacity, offer good offices,

conciliation or mediation with the view to assisting Members to settle a dispute. To date, no use has ever been made of this possibility although in 2001 the Director-General explicitly invited Members to do so.

## **1.3 Outcome of Consultations**

### **1.3.1 Mutually Agreed Solution**

Since 1995, a significant number of disputes on which consultations were held have been resolved, or appear to have been resolved, by the parties without the need for recourse to adjudication by a panel. In some cases, the dispute was simply not pursued any further; in other cases, a mutually agreed solution to the dispute was reached.

#### **Article 3.5 DSU**

All mutually agreed solutions must be consistent with the WTO agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

#### **Article 3.6 DSU**

All mutually agreed solutions must be notified to 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.

### **1.3.2 Resort to a panel**

#### **Article 4.7 DSU**

If consultations between the parties fail to settle the dispute within 60 days of the receipt of the request for consultations, the complaining party may request the DSB to establish a panel to adjudicate the dispute. The complaining party may request a panel during the 60-day 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, the consulting parties cannot 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.

#### **Article 12.10 DSU**

Consultations between the parties with the aim of settling the dispute can, and do, continue during the panel process. 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.<sup>1</sup>

#### **Article 11 DSU**

<sup>1</sup> See e.g., *European Communities - Trade Description of Scallops, complaints by Canada, Peru and Chile, WT/DS7, WT/DS12 and WT/DS14* and *European Communities - Measures Affecting Butter Products, complaint by New Zealand, WT/DS72*.



**Article 24.2 DSU**

In dispute settlement cases involving a least-developed country 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 a least-developed country 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. The Director-General or the Chairman of the DSB, in providing this assistance, may consult any source, which either deems appropriate. Since, to date no least-developed country Member has been involved in a dispute as either a complainant or respondent, no use has yet been made of this possibility.

**1.4 Test your understanding**

- 1. What is the primary aim and object of consultations pursuant to Article 4 of the DSU? Can consultations also serve other purposes?**
- 2. Must parties to a dispute always hold consultations before requesting the establishment of a panel? Will consultations always last at least 60 days? Can consultations last longer than 60 days?**
- 3. May WTO Members resolve a dispute by *agreeing* to a solution, which deviates from the *WTO Agreement*?**
- 4. Does the DSU provide any special rules for developing country Members engaged in consultations?**

## 2. THE ESTABLISHMENT AND COMPOSITION OF A PANEL

### Objectives

**On completion of this section, the reader will be able:**

- to explain how and by whom decisions on the establishment and the composition of panels are taken;
- to appreciate the importance of sufficiently precise panel requests;
- to appraise the qualifications that members of a panel have to possess.

### 2.1 Establishment of a Panel

#### 2.1.1 Panel Request

#### Article 6.2 DSU

The request for establishment of a panel must be made to the DSB in writing and must 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 *EC - Bananas III*, the Appellate Body found that:

*... It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.<sup>2</sup>*

Whether the “specific measures at issue” are sufficiently identified in the panel request relates to the ability of the responding party to defend itself given the actual reference to the measure complained about.<sup>3</sup> With regard to the requirement that the request for a panel must “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly”, the Appellate Body noted that the DSU demands only a brief summary of the legal basis of the complaint. The summary must, however, be one “sufficient to present the problem clearly”.<sup>4</sup> The claims, but not the arguments, must all be specified sufficiently in the request for the establishment of a panel.<sup>5</sup> In *EC – Bananas III*, the Appellate Body found that in view of the particular circumstances of that case, the listing of the articles of the agreements alleged to have been breached satisfied the minimum requirements of the DSU.<sup>6</sup>

<sup>2</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”)*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142.

<sup>3</sup> Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment (“EC – Computer Equipment”)*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 70.

<sup>4</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (“Korea – Dairy”)*, WT/DS98/AB/R, adopted 12 January 2000, para. 120.

<sup>5</sup> Appellate Body Report, *EC – Bananas III*, para. 143.

<sup>6</sup> Appellate Body Report, *EC – Bananas III*, para. 141.

Whether the mere listing of the articles claimed to have been violated actually meets the standard must, however, be examined on a case-by-case basis.

### **2.1.2** *Decision by the DSB*

#### **Article 6.1 DSU**

The DSB establishes the panel *at the latest* at the DSB meeting following the meeting at which the request for the establishment first appears as an item on the agenda, unless at that meeting the DSB decides by consensus *not* to establish a panel (reverse consensus). It is clear that the latter is not likely to happen and that, therefore, the establishment of a panel by the DSB is “quasi-automatic”. If the responding party does not object, a panel can be established at the DSB meeting at which the request for the establishment first appears on the agenda.<sup>7</sup> Usually, however, the responding party objects to the establishment of the panel at the first DSB meeting.

A practice has evolved whereby immediately after the DSB’s decision to establish the panel (or within 10 days of this decision) other Members notify their interest in the dispute and reserve their third party rights.<sup>8</sup>

#### **Article 9.1 DSU**

Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. Whenever feasible, a single panel should be established to examine such complaints.

## **2.2** *Composition of a Panel*

### **2.2.1** *Number of Panelists*

#### **Article 8.5 DSU**

Panels are normally composed of three persons. The parties to the dispute can agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. However, to date, this has never occurred.

### **2.2.2** *Required Qualifications for Panelists*

#### **Article 8.1 DSU**

Pursuant to the DSU, panels must be composed of well-qualified governmental and/or non-governmental individuals. By way of guidance, the DSU indicates that these individuals can be:

*... persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.*

<sup>7</sup> This has in fact happened in a few cases.

<sup>8</sup> See below, p. 19-20.

**Article 8.2 DSU**

The DSU stipulates that panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience. Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise. While this is not common, parties have in some cases agreed on a panelist who is a national of one of the parties. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member. In all but a few panels dealing with disputes involving a developing country Member, at least one of the panelists was a national of a developing country Member.

**Article 8.3 DSU****Article 8.10 DSU****Article 8.9 DSU**

Panelists are mostly government trade officials with legal training, many among them Geneva-based diplomats of WTO Members not involved in the dispute before the panel. The DSU explicitly provides, however, that panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. In recent years, there has been an increase in the number of academics and legal practitioners serving as panelists. It is also significant that at least half of the panelists have already served on a GATT or WTO panel before their selection.

### **2.2.3 Panel Selection Process**

**Article 8.6 DSU**

Once a panel is established by the DSB, the parties to the dispute will try to reach agreement on the composition of the panel. The Secretariat shall propose nominations for the panel to the parties to the dispute. The DSU requires the parties to the dispute not to oppose nominations except for compelling reasons. However, parties often reject the nominations initially proposed by the WTO Secretariat without much justification. In practice, the composition of the panel is often a difficult and contentious process, which may take many weeks. If the parties are unable to agree on the composition of the panel within 20 days of its establishment by the DSB, either party *may*, however, request the Director-General of the WTO to determine the composition of the panel. Within 10 days of such a request, the Director-General shall – after consulting the parties to the dispute and the Chairmen of the DSB and of the relevant Council or Committee – appoint the panelists whom he considers most appropriate. In recent years, the Director-General has determined the composition of almost half of the panels.

**Article 8.7 DSU****Article 8.4 DSU**

To assist in the selection of panelists, the Secretariat maintains a list of governmental and non-governmental individuals possessing the required qualifications to serve as a panelist. Members periodically suggest names of individuals for inclusion on this list and those names shall be added to the list upon approval by the DSB. However, this list is merely indicative and individuals not included in this Indicative List may be selected as panelists. In

fact, most first-time panelists were not on the Indicative List at the time of their selection.

## **2.3** Test your understanding

- 1. Why is it important that the request for the establishment of a panel be sufficiently precise? How precise must the panel request be?**
- 2. Can a panel be established at the meeting of the DSB at which the panel request first appeared on the DSB's agenda? Is it correct to say that the establishment of a panel by the DSB is "quasi-automatic"? If so, why?**
- 3. What are the required qualifications for a member of a panel? Will the parties to the dispute always have the final say on the composition of the panel that will examine the dispute between them?**

## 3. THE MANDATE OF A PANEL

### Objectives

On completion of this section, the reader will be able:

- to appraise the task of a panel and the scope and limits of the powers of a panel to carry out that task,
- to explain what the “terms of reference” of a panel are and what the standard of review is that a panel applies in assessing the WTO-consistency of a contested measure,
- to describe to which extent the DSU condones judicial activism and the exercise of judicial economy,
- to explain what rules of conduct are applicable to panelists and,
- to describe what the role of the WTO Secretariat is in panel proceedings.

### 3.1 Terms of Reference

#### 3.1.1 Standard Terms

#### Article 7.1 DSU

Unless the parties agree otherwise within 20 days from the establishment of the panel, a panel is given the following standard terms of reference:

*To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement.*

The document referred to in these standard terms of reference is usually the request for the establishment of a panel. Hence, a claim falls within the panel’s terms of reference only if that claim is identified in the request for the establishment of a panel.

As the Appellate Body stated in *Brazil – Desiccated Coconut*, the terms of reference of the panel are important for two reasons:

*First, terms of reference fulfil an important due process objective — they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant’s case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.<sup>9</sup>*

<sup>9</sup> Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* (“Brazil – Desiccated Coconut”), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, p. xx.

A panel may consider only those claims that it has authority to consider under its terms of reference.<sup>10</sup> A panel is bound by its terms of reference.<sup>11</sup> It is, therefore, important that a request for the establishment of a panel be sufficiently precise.<sup>12</sup>

In case of a “broadly phrased” request for the establishment of a panel, it may be necessary to examine closely the complainant’s submissions to the panel to determine precisely which claims have been made and fall under the terms of reference of the panel.<sup>13</sup>

### 3.1.2 Special Terms

#### Article 7.3 DSU

Within 20 days of the establishment of the panel, the parties to the dispute can agree on special terms of reference for the panel. This occurs rarely.<sup>14</sup> In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute. However, if no agreement on special terms of reference is reached within 20 days of the establishment of the panel, the panel shall have standard terms of reference.

#### Article 7.1 DSU

## 3.2 Standard of Review

#### Article 11 DSU

A panel is called upon to review the consistency with WTO law of a challenged measure. Both the measure at issue and the relevant provisions of WTO law allegedly violated are determined by the terms of reference of the panel. But what is the standard of review a panel has to apply in reviewing the WTO consistency of the challenged measure? Article 11 of the DSU stipulates:

*The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.*

In *EC – Hormones*, the Appellate Body noted that Article 11 of the DSU:

*... articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.*<sup>15</sup>

<sup>10</sup>Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (“*India – Patents (US)*”), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 92. A panel cannot assume jurisdiction that it does not have (*Ibid.*).

<sup>11</sup>Appellate Body Report, *India – Patents*, para. 93.

<sup>12</sup>See above, p. 7.

<sup>13</sup>Appellate Body Report, *Chile – Price Band*, para. 165.

<sup>14</sup>See e.g., in *Brazil – Desiccated Coconut*, complaint by the Philippines, WT/DS22.

<sup>15</sup>Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* (“*EC – Hormones*”), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para.116.

As far as fact-finding is concerned, the appropriate standard is neither a *de novo* review of the facts nor “total deference” to the factual findings of national authorities. Pursuant to Article 11 of the DSU, panels have rather “to make an objective assessment of the facts”. With regard to legal questions, i.e., the consistency or inconsistency of a Member’s measure with the specified provisions of the relevant agreement, Article 11 imposes the same standard on panels, i.e., “to make an objective assessment of ... the applicability of and conformity with the relevant covered agreement”.

In a number of appeals of panel reports, the Appellate Body addressed the question when a panel may be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it. According to the Appellate Body, “not every error in the appreciation of the evidence ... may be characterised as a failure to make an objective assessment of the facts.”<sup>16</sup> The Appellate Body stated in *EC-Hormones*:

*The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel’s duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. “Disregard” and “distortion” and “misrepresentation” of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgement in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.*<sup>17</sup>

An allegation that a panel has failed to conduct an objective assessment of the matter before it as required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to “the very core of the integrity of the WTO dispute settlement process itself.”<sup>18</sup> So far, in only a few cases the Appellate Body found that a panel violated its obligation under Article 11 of the DSU.<sup>19</sup> In *US – Lamb Safeguard*, for example, the Appellate Body found that the Panel had not *applied* the appropriate standard of review, under Article 11 of the DSU, in examining whether the United States International Trade Commission had provided a reasoned and adequate explanation of how the facts support a

<sup>16</sup> Appellate Body Report, *EC – Hormones*, para. 133.

<sup>17</sup> Ibid. The Appellate Body considered that “a claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.” Ibid.

<sup>18</sup> Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products (“EC – Poultry”)*, WT/DS69/AB/R, adopted 23 July 1998, para. 133.

<sup>19</sup> E.g., Appellate Body Report, *US – United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (“US – Wheat Gluten”)*, WT/DS166/AB/R, adopted 19 January 2001, paras. 161-162; and Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (“US – Lamb”)*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 149.



determination of “threat of serious injury” under Article 4.2(a) of the *Agreement on Safeguards*. In reaching this conclusion the Appellate Body noted:

*We wish to emphasize that, although panels are not entitled to conduct a de novo review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities’ explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities’ explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities’ explanation does not seem adequate in the light of that alternative explanation. Thus, in making an “objective assessment” of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.<sup>20</sup>*

#### **Anti-Dumping Agreement**

Article 11 of the DSU sets forth the appropriate standard of review for panels for all but one of the covered agreements. The only exception is the *Anti-Dumping Agreement*<sup>21</sup> in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement.<sup>22</sup>

### **3.3 Panels Acting Ultra Petita?**

If a panel makes a finding on a claim that does not fall within its terms of reference, the panel does not make an objective assessment *of the matter before it*, as required by Article 11. Rather, the panel makes a finding on a matter that was *not* before it. As the Appellate Body held in *Chile – Price Band* such panel acts *ultra petita* and inconsistently with Article 11 of the DSU.<sup>23</sup>

However, if a panel makes a finding on a claim which does fall within its terms of reference, the Appellate Body ruled in *EC – Hormones* that:

*... nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration.<sup>24</sup>*

<sup>20</sup> Appellate Body Report, *US – Lamb*, paras. 106-107.

<sup>21</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>22</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (“*US – Hot-Rolled Steel*”), WT/DS184/AB/R, adopted 23 August 2001, para. 54 ff. See in more detail in Module 3.6 of this Course.

<sup>23</sup> Appellate Body Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, para. 173.

<sup>24</sup> Appellate Body Report, *EC – Hormones*, para. 156.

## 3.4 Judicial Activism and Judicial Economy

### 3.4.1 Judicial Activism

#### Articles 3.2 and 19.2 DSU

The WTO dispute settlement system and, therefore, panels, serve to preserve the rights and obligations of Members under the covered agreements *as well as to clarify* the existing provisions of these agreements. However, in two separate provisions, the DSU explicitly cautions panels against “judicial activism”. The DSU prohibits panels “to add to or diminish the rights and obligations provided in the covered agreements”.

### 3.4.2 Judicial Economy

Complaining parties often assert numerous violations, often under various agreements. It is well-established case law that panels are not required to examine each and every one of the legal claims that a complaining party makes. The aim of dispute settlement is to secure a positive solution to a dispute. Therefore, panels “need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”<sup>25</sup> A panel has discretion to determine the claims it must address in order actually and effectively to resolve the dispute between the parties.<sup>26</sup> The Appellate Body has, however, cautioned panels to be careful when applying the principle of judicial economy. To provide only a partial resolution of the matter at issue may be false judicial economy since the unanswered issues may well give rise to a new dispute. As the Appellate Body stated in *Australia-Salmon* 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’.<sup>27</sup>

## 3.5 Rules of Conduct

#### Para. II.1 RoC

In hearing and deciding a dispute panelists are subject to the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “*Rules of Conduct*” or “*RoC*”).<sup>28</sup> These rules require that panelists

<sup>25</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (“*US – Wool Shirts and Blouses*”), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:1, 323, p. 19.

<sup>26</sup> Appellate Body Report, *India – Patents (US)*, para. 87.

<sup>27</sup> Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* (“*Australia – Salmon*”), WT/DS18/AB/R, adopted 6 November 1998, para. 223. See also Appellate Body Report, *Japan – Measures Affecting Agricultural Products* (“*Japan – Agricultural Products II*”), WT/DS76/AB/R, adopted 19 March 1999, para. 111.

<sup>28</sup> WT/DSB/RC/1, 11 December 1996.

*... shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings.*

**Para. III.1 RoC**

To ensure compliance with this “governing principle”, panelists are to disclose:

*... the existence or development of any interest, relationship or matter that person could reasonable be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person’s independence or impartiality.*

**Annex 2 RoC**

This disclosure obligation includes information on financial, professional and other active interests as well as considered statements of public opinion and employment or family interests. Parties can request the disqualification of a panelist on the ground of material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests. The evidence of such material violation is provided to the Chairman of the DSB, who will, in consultation with the Director-General of the WTO and the chairpersons of the relevant WTO bodies, decide whether a material violation has occurred. If it has, the panelist is replaced. To date, no panelist has ever been found to have committed a material violation of the *Rules of Conduct*. However, in a few instances a panelist withdrew on his own initiative after a party raised concerns about a possible conflict of interests.

**Para. VIII RoC**

**Article 8.11 DSU**

Panelists’ expenses, including travel and subsistence allowances, are met from the WTO budget. Non-governmental individuals serving as panelists receive a fee for their service. However, this fee is low compared to fees ordinarily paid in international arbitration.

### **3.6 Role of the WTO Secretariat**

**Article 27.1 DSU**

The WTO Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support. The Legal Affairs Division and the Rules Division are the main divisions of the WTO Secretariat that service dispute settlement panels. However, a significant number of staff from other “operational divisions” of the WTO Secretariat also assists panels. Depending on the agreement principally at issue in a particular dispute, a panel will often be assisted by a cross divisional, inter-disciplinary team (i.e., economists and lawyers) drawn from the Legal Affairs Division and other divisions of the WTO Secretariat. Panels considering cases relating to state trading, subsidies, countervailing duties and anti-dumping are assisted by the staff of the Rules Division, which specializes in these matters. Officials of the WTO Secretariat assigned to assist panels are also subject to the *Rules of Conduct* and bound by the obligations of independence, impartiality, confidentiality and the avoidance of direct or indirect conflicts of interests.

### **3.7 Test your understanding**

- 1. What are, and where do we find, the terms of reference of a panel? Why are the terms of reference of a panel important?**
- 2. What is the standard of review a panel has to apply in reviewing the WTO consistency of a measure challenged by the complaining party? When does a panel not meet the requirement of Article 11 to make an objective assessment of the matter before it?**
- 3. Could a panel remedy an obvious lacuna in the *WTO Agreement* when this is necessary to resolve a dispute between the parties?**
- 4. Does a panel have to address, and decide on, every claim of the complaining party? Can the panel ignore an explicit request of the complaining part to rule on a particular claim?**
- 5. Can panelists be disqualified? If so, by whom and on which grounds?**
- 6. What is the role of the WTO Secretariat in panel proceedings?**

## 4. SPECIFIC FEATURES OF THE PANEL PROCESS

### Objectives

On completion of this section, the reader will be able:

- to appreciate the limitations on the access to panel proceedings, with the issues raised by *amicus curiae* briefs and representation by private lawyers and, the various aspects of the confidentiality of panel proceedings;
- to explain the rules of interpretation and the rules on burden of proof applied by panels, as well as the rules on evidence and use of experts applicable in panel proceedings;
- to evaluate what requirements a panel report must meet under the DSU.

### 4.1 Access to Panel Proceedings

Only WTO Members that are parties to a dispute and, to a more limited extent, WTO Members that are third parties to the dispute, have a legal right to make submissions to, and have a legal right to have those submission considered by, a panel. In *US – Shrimp*, the Appellate Body ruled as follows:

*It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements, as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members “having a substantial interest in a matter before a panel” may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel.<sup>29</sup>*

Other Members, individuals, companies or organizations do not have such legal rights. They do not, as such, have a direct *right* of access to the panel proceedings.<sup>30</sup>

#### 4.1.1 Third Parties

### Article 10 DSU

With regard to third parties, we note that any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB at the time of the establishment of the panel, is given an opportunity to be heard by the panel and to make written submissions to the panel. Although this is

<sup>29</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*US – Shrimp*”), WT/DS58/AB/R, adopted 6 November 1998, para. 101.

<sup>30</sup> On the authority of panels and the Appellate Body to consider *amicus curiae* briefs, see below, p. 20-21.

not set out in the DSU, a practice has evolved whereby third parties notify their interest within 10 days of the establishment of a panel. It is generally up to the individual Member to decide for itself whether it has a substantial interest. The parties to the dispute do not seek to review the existence of the substantial interest. It is, in fact, not uncommon for a Member, and in particular for the United States or the European Communities, to become a third party because of a “systematic” interest in a case. The access of third parties to panel proceedings is, however, limited.<sup>31</sup>

#### **4.1.2 Amicus Curiae briefs**

The DSU does not provide any specific rules on whether panels may accept and consider in their deliberations unsolicited *amicus curiae* (i.e., friend of the court) briefs. The Appellate Body noted in *US - Shrimp*, however, the comprehensive nature of the authority of a panel under Article 13 of the DSU as well as the authority under Article 12.1 of the DSU to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU.<sup>32</sup> The Appellate Body considered that:

*the thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel ... ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.*<sup>33</sup>

According to the Appellate Body, that authority, and the scope thereof, is indispensably necessary to enable a panel to discharge the duty imposed by Article 11 of the DSU to ‘make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...’.<sup>34</sup> The Appellate Body thus came to the conclusion that a panel has:

*... the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.*<sup>35</sup>

This ruling of the Appellate Body is controversial and much criticized. Most WTO Members are of the view that under the current provisions of the DSU, panels do not have the authority to accept and consider unsolicited *amicus curiae* briefs. According to those Members, the WTO dispute settlement system is a state-to-state dispute settlement system in which there is no role for, in particular, non-governmental organizations. When the Appellate Body adopted an *ad hoc* procedure for the filing of *amicus curiae* briefs in the *EC – Asbestos* appeal proceedings, a special meeting of the General Council was convened

<sup>31</sup> See below, p. 35.

<sup>32</sup> Appellate Body Report, *US – Shrimp*, para. 105. Both the authority of panels under Articles 12 and 13 of the DSU is discussed below, at p. xx and p. xx respectively.

<sup>33</sup> Appellate Body Report, *US – Shrimp*, para. 106.

<sup>34</sup> Ibid.

<sup>35</sup> Appellate Body Report, *US – Shrimp*, para. 108.

on 22 November 2000 at the request of incensed WTO Members. At the conclusion of this meeting, the Chairman agreed to call upon the Appellate Body to exercise extreme caution in future cases until Members had considered what rules were needed regarding *amicus curiae* briefs.<sup>36</sup> While not specifically targeted by the DSB Chairman, it is clear that also panels are called upon to exercise similar caution. To date, only a few panels have in fact accepted and considered unsolicited briefs.

### 4.1.3 *Private Counsel*

The DSU does not explicitly address the issue of representation of the parties before panels. In *EC – Bananas III*, the issue arose whether private counsel, not employed by government, may represent a party or third party (such as Saint Lucia) before the Appellate Body. In its ruling, the Appellate Body noted that nothing in the *WTO Agreement* or the DSU, nor in customary international law or the prevailing practice of international tribunals, prevents a WTO Member from determining for itself the composition of its delegation in WTO dispute settlement proceedings.<sup>37</sup> A party can, therefore, decide that private counsel forms part of its delegation and will represent it before the panel. The Appellate Body also noted:

*... that representation by counsel of a government's own choice may well be a matter of particular significance — especially for developing-country Members — to enable them to participate fully in dispute settlement proceedings.*<sup>38</sup>

While the ruling of the Appellate Body concerned the proceedings before this body, the reasoning of this ruling is equally relevant for panel proceedings and private counsel now routinely appear in panel proceedings as part of the delegation of a party or third party. The parties and third parties have the responsibility for all members of their delegations and shall ensure that all members of the delegation, including private counsel, act in accordance with the rules of the DSU and the Working Procedures of the panel, particularly in regard to the confidentiality of the proceedings.<sup>39</sup>

## 4.2 Confidentiality

### 4.2.1 *Confidentiality of written submissions and the panel report*

#### Article 18.2

Panel proceedings are characterized by their confidentiality. All written submissions to the panel by the parties and third parties to the dispute are

<sup>36</sup> See Chapter 3.3 of this Handbook on the “Appellate Review Process”.

<sup>37</sup> *EC – Bananas III*, para. 10.

<sup>38</sup> *EC – Bananas III*, para. 12.

<sup>39</sup> In this respect, see Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (“*Thailand – H-Beams*”), WT/DS122/AB/R, adopted 5 April 2001, para. 68.

**DSU & Appendix 3,  
para. 3**

confidential. Parties may make their *own* submissions available to the public. While a few Members do so in a systematic manner, most parties choose to keep their submissions confidential. The DSU provides that a party to a dispute must, upon request of any WTO Member, provide a non-confidential summary of the information contained in its submissions to the panel that could be disclosed to the public. However, this provision does not provide for a deadline by which such non-confidential summary must be made available. In the few instances in which WTO Members requested such a summary, it was usually made available too late to be of any practical relevance. The actual submissions remain confidential even after the dispute has been resolved.

The interim report of the panel and the final panel report as long as it is only issued to the parties to the dispute are also confidential. The final panel report only becomes a public document when it is circulated to all WTO Members. In reality, however, the interim report and the final report issued to the parties do not remain confidential very long and are usually “leaked” to the media.

#### **4.2.2 Confidentiality of panel meetings**

**Appendix 3,  
para. 2 DSU**

The meetings of the panel with the parties and third parties take place behind closed doors. Nobody except the parties themselves and the officials of the WTO Secretariat assisting the panel are allowed to attend all meetings of the panel with the parties. Third parties are usually invited to attend only one session of the first substantive panel meeting.<sup>40</sup>

#### **4.2.3 Business Confidential Information**

Recognizing that parties have a legitimate interest in protecting sensitive business confidential information submitted to a panel, the Panels in *Canada – Aircraft* and *Brazil – Aircraft* adopted special procedures governing business confidential information that go beyond the protection afforded by Article 18.2 of the DSU.<sup>41</sup>

Under the Procedures Governing Business Confidential Information adopted by the Panel in *Canada – Aircraft*, the business confidential information was to be stored in a safe in a locked room at the premises of the relevant Geneva missions, with restrictions imposed on access to the locked room and safe. The Procedures also provided for either party to visit the other party’s Geneva mission and review the proposed location of the safe and propose any changes. Finally, the Procedures provided for the return and destruction of the business confidential information after completion of the panel process. In spite of these Procedures adopted by the Panel, Canada nevertheless refused to submit certain business confidential information because these Procedures did not, according to Canada, provide the requisite level of protection.

<sup>40</sup> See below, p. 35.

<sup>41</sup> Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (“*Canada – Aircraft*”), WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, Annex 1; and *Brazil – Export Financing Programme for Aircraft* (“*Brazil – Aircraft*”), WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, Annex 1



## 4.3 Rules of Interpretation

### Article 3.2 DSU

### Article 32 Vienna Convention

### Article 31 Vienna Convention

Panels must interpret the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. As the Appellate Body found in *US – Gasoline* and *Japan – Alcoholic Beverages*, the rules embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”) form part of the customary rules of interpretation of public international law.<sup>42</sup> Consequently, panels and the Appellate Body interpret provisions of the covered agreements in accordance with the ordinary meaning of the words of the provision taken in their context and in the light of the object and purpose of the agreement involved. Interpretation must start with and be based on the text of the agreement.<sup>43</sup> One of the corollaries of the general rule of interpretation in the Vienna Convention is that interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.<sup>44</sup> On the other hand, the general rule of treaty interpretation neither requires nor condones “the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”<sup>45</sup> The application of the general rule of interpretation set out in Article 31 of the *Vienna Convention* will usually allow the panel to establish the meaning of a term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result, which is manifestly absurd or unreasonable, a panel may have recourse to the supplementary means of interpretation provided for in Article 32 of the *Vienna Convention*. These supplementary means of interpretation include “the preparatory work of the treaty and the circumstances of its conclusion”. With regard to “the circumstances of [the] conclusion” of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.<sup>46</sup>

## 4.4 Rules on Evidence

### 4.4.1 Submission of Evidence

The DSU does not establish precise rules or deadlines for the submission of evidence by a party to the dispute. In *Argentina – Textiles and Apparel*, the Appellate Body noted:

<sup>42</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (“*US – Gasoline*”), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 17; and Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* (“*Japan – Alcoholic Beverages II*”), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 10.

<sup>43</sup> See, for example, Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11; and Appellate Body Report, *US – Shrimp*, para. 114.

<sup>44</sup> Appellate Body Report, *US – Gasoline*, p. 23. See also, for example, Appellate Body Reports: *Japan – Alcoholic Beverages II*, p. 12; and *Korea – Dairy*, para. 81.

<sup>45</sup> Appellate Body Report, *India – Patents*, para. 45. See also Appellate Body Report, *EC – Hormones*, para. 181.

<sup>46</sup> Appellate Body Report, *EC – Computer Equipment*, para. 86.

*Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. The Working Procedures in Appendix 3 also do not establish precise deadlines for the presentation of evidence by a party to the dispute. It is true that the Working Procedures “do not prohibit” submission of additional evidence after the first substantive meeting of a panel with the parties.<sup>47</sup>*

However, the DSU contemplates two distinguishable stages in a panel proceeding: a first stage during which the parties should set out their case in brief, including a full presentation of the facts on the basis of submission of supporting evidence; and a second stage which is generally designed to permit “rebuttals” by each party of the arguments and evidence submitted by the other party.<sup>48</sup> Nevertheless, unless specific deadlines for the submission of evidence are set out in the working procedures of the panel, parties can submit new evidence as late as the second meeting with the panel. The panel must of course constantly be careful to observe due process, which, *inter alia*, entails providing the parties adequate opportunity to respond to the evidence submitted.<sup>49</sup>

#### **4.4.2 Requesting Parties for Information**

##### **Article 13.1 DSU**

The DSU provides panels with discretionary authority to request and obtain information from *any Member*, including *a fortiori* a Member who is a party to a dispute before the panel.<sup>50</sup> This is made very clear by the third sentence of Article 13.1 of the DSU, which states:

*A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.*

Article 13.1 imposes *no conditions* on the exercise of this discretionary authority to seek and obtain information from the parties. This authority is, for example, *not* conditional upon the other party to the dispute having previously established, on a *prima facie* basis, such other party’s claim or defence.<sup>51</sup> Furthermore, the Appellate Body ruled that the word “should” in the third sentence of Article 13.1, quoted above, is in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to “respond promptly and fully” to requests made by panels for information under Article 13.1 of the DSU.<sup>52</sup> If a party refuses to give certain information to the Panel,

<sup>49</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 80-81; and Appellate Body Report, *Australia – Salmon*, para. 272.

<sup>50</sup> Article 13.1 of the DSU.

<sup>51</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (“Canada – Aircraft”), WT/DS70/AB/R, adopted 20 August 1999, para.185. See also *Thailand – H-Beams*, para. 135.

<sup>52</sup> Appellate Body Report, *Canada – Aircraft*, para. 187.

the Panel may draw negative inferences from this refusal.<sup>53</sup>

#### 4.4.3 Use of Experts

##### Article 13 DSU

Disputes brought to panels for adjudication often involve complex factual, technical and scientific issues. Unlike in the context of the old GATT dispute settlement proceedings, factual, technical and scientific issues frequently play a central role in WTO dispute settlement proceedings. Article 13 of the DSU gives panels the authority to seek information and technical advice from any individual or body, which it deems appropriate. Panels may consult experts to obtain their opinion on certain aspects of the matter under consideration.

As the Appellate Body ruled in *Argentina - Textiles and Apparel*, “this is a grant of discretionary authority”.<sup>54</sup> In *US - Shrimp*, the Appellate Body further stated:

... a panel ... has the authority to accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof. It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.<sup>55</sup>

This authority is “indispensably necessary” to enable a panel to discharge its duty imposed by Article 11 of the DSU to “make an objective assessment of the matter before it.”<sup>56</sup>

##### Article 13.1 DSU

To date, panels have consulted experts in, for example, *EC – Hormones*, *Australia – Salmon*, *Japan – Agricultural Products II* and *EC - Asbestos*, all disputes involving complex scientific issues. The panels, in these cases, typically selected the experts in consultation with the parties, presented the experts with a list of questions to which each expert individually responded in writing, and finally called a special meeting with the experts at which these and other questions were discussed with the panelists and the parties. The panel report usually contained both the written responses of the experts to the panel’s questions as well as a transcript of the discussions at the meeting with the panel. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

##### Article 13.2 DSU

Apart from consulting individual experts, a panel can with respect to a factual issue concerning a scientific or other technical matter, request an advisory report in writing from an expert review group. Rules for the establishment of

<sup>53</sup> Appellate Body Report, *Canada – Aircraft*, para. 203.

<sup>54</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84.

<sup>55</sup> Appellate Body Report, *US – Shrimp*, para. 104.

<sup>56</sup> Appellate Body Report, *US – Shrimp*, para. 106.

such a group and its procedures are set forth in Appendix 4 of the DSU. Expert review groups are under the authority of the panel and report to the panel. The panel decides their terms of reference. The report of an expert review group is advisory only; it does not bind the panel. To date, panels have made no use of this possibility to request an advisory report from an expert review group. Panels have preferred to seek information from experts directly and on an individual basis.<sup>57</sup>

It should be noted that while a panel has broad authority to consult experts to help it to understand and evaluate the evidence submitted and the arguments made by the parties, a panel may not make the case for one or the other party on the basis of information provided by the experts. In *Japan – Agricultural Products II*, the Appellate Body ruled:

*Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party, which has not established a prima facie case of inconsistency, based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.*

*In the present case, the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a prima facie case of inconsistency with Article 5.6 based on claims relating to the “determination of sorption levels”. The United States did not even argue that the “determination of sorption levels” is an alternative measure, which meets the three elements under Article 5.6.<sup>58</sup>*

#### Other WTO provisions

Apart from Article 13 of the DSU, discussed here, panels have either the possibility or the obligation to consult experts under a number of other covered agreements: *SPS Agreement*, Article 11.2; *TBT Agreement*, Article 14.2 and 3, Annex 2; *Agreement on Implementation of Article VII of the GATT 1994*; Article 19.3 and 4, Annex 2 and the *SCM Agreement*, Article 4.5 and 24.3.

#### Fact-finding compared

Overall, when compared with fact-finding procedures of national courts, the fact-finding procedures of panels are clearly less well developed. In *India – Patents*, the Appellate Body observed:

<sup>57</sup> The DSU also leaves it to the sound discretion of a panel to determine whether the establishment of an expert review group is necessary or appropriate (Appellate Body Report, *EC – Hormones*, para. 147).

<sup>58</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 129 and 130.

*It is worth noting that, with respect to fact-finding, the dictates of due process could better be served if panels had standard working procedures that provided for appropriate factual discovery at an early stage in panel proceedings.<sup>59</sup>*

More sophisticated fact-finding techniques will need to be adopted in the future.

## 4.5 Burden of Proof

The DSU does not contain any specific rules concerning the burden of proof in panel proceedings. However, in *US – Wool Shirts and Blouses*, the Appellate Body noted:

*In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining 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.<sup>60</sup>*

These rules on the burden of proof also apply in panel proceedings. Precisely how much and precisely what kind of evidence will be required to establish a *presumption* that what is claimed is true, i.e., what is required to establish a *prima facie* case, will necessarily vary from measure to measure, provision to provision, and case to case.<sup>61</sup>

## 4.6 Characteristics of a Panel Report

A panel submits its findings in the form of a written report to the DSB. This report typically consists of an introductory section on the procedural aspects of the dispute, a section on factual aspects of the dispute (in which the measure at issue is discussed); a section setting out the claims of parties; sections summarizing the arguments of the parties and third parties, a section on the interim review, the section containing the panel's findings and, finally, the panel's conclusions. As of recently, a number of panels have opted not to include in their report sections summarizing the arguments of the parties and third parties but rather to attach all submissions of parties and third parties to the report. However, panels have only taken this approach when parties agreed to it.

<sup>59</sup> Appellate Body Report, *India – Patents*, para. 95.

<sup>60</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 335.

<sup>61</sup> Ibid.

**Article 12.7 DSU**

A panel report must, at a minimum, set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. In a few cases to date, parties have challenged a panel report before the Appellate Body for lack of a basic rationale behind the panel's findings and recommendations.<sup>62</sup> In *Argentina – Footwear Safeguard (EC)*, the Appellate Body found as follows:

*In this case, the Panel conducted extensive factual and legal analyses of the competing claims made by the parties, set out numerous factual findings based on detailed consideration of the evidence before the Argentine authorities as well as other evidence presented to the Panel, and provided extensive explanations of how and why it reached its factual and legal conclusions. Although Argentina may not agree with the rationale provided by the Panel, and we do not ourselves agree with all of its reasoning, we have no doubt that the Panel set out, in its Report, a “basic rationale” consistent with the requirements of Article 12.7 of the DSU.<sup>63</sup>*

**Article 12.11 DSU**

Where one or more of the parties to the dispute is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements and which have been raised by the developing country Member in the course of the dispute settlement procedures. In *India – Quantitative Restrictions*, for example, the Panel specifically referred to this requirement and noted:

*In this instance, we have noted that Article XVIII:B as a whole, on which our analysis throughout this section is based, embodies the principle of special and differential treatment in relation to measures taken for balance-of-payments purposes. This entire part G therefore reflects our consideration of relevant provisions on special and differential treatment, as does Section VII of our report (suggestions for implementation).<sup>64</sup>*

**Article 19.1 DSU**

Where a panel concludes that a Member's measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring that measure into conformity with that agreement. The recommendations and rulings of the panel are not legally binding by themselves. They become legally binding only when they are adopted by the DSB and thus have become the recommendations and rulings of the DSB. The DSB adopts the panel report, and its recommendations and rulings, by reverse consensus, i.e., the DSB

**Article 16.4 DSU**

<sup>62</sup> Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* (“Korea – Alcoholic Beverages”), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, para. 168; Appellate Body Report, *Chile – Taxes on Alcoholic Beverages* (“Chile – Alcoholic Beverages”), WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 78; and Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* (“Argentina – Footwear (EC)”), WT/DS121/AB/R, adopted 12 January 2000, para. 149.

<sup>63</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 149.

<sup>64</sup> Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (“India – Quantitative Restrictions”), WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, para. 5.157.

adopts the report unless it decides by consensus *not* to adopt the report. It is clear that the latter is not likely to happen since the “winning” party will have a strong interest in the adoption of the report. Therefore, the adoption of panel reports by the DSB is “quasi-automatic”.

**Article 19.1 DSU**

In addition to making recommendations, the panel may suggest ways in which the Member concerned could implement those recommendations. These suggestions are not legally binding on the Member concerned but because the panel making the suggestions might later be called upon to assess the sufficiency of the implementation of the recommendations, such suggestions are likely to have a certain impact.<sup>65</sup> To date, few panels have made use of this authority to make suggestions regarding implementation of their recommendations.<sup>66</sup>

**Article 19.2 DSU**

As already pointed out above, panels cannot in their findings and recommendations add to or diminish to the rights and obligations of Members provided for in the covered agreements. They are explicitly proscribed from doing so.

**Article 14.3 DSU**

Panelists can express in the panel report a separate opinion, be it dissenting or concurring. However, if they do, they must do so *anonymously*. To date, there have been very few panel reports setting out a separate opinion of one of the panelists.<sup>67</sup>

**Article 9.2 DSU**

When a single panel examines complaints of multiple complainants, the panel must present its findings in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. This happened in *EC – Bananas III* in which the panel issued four separate, be it in substance largely identical, reports.<sup>68</sup>

**Article 12.7 DSU**

Occasionally parties have reached a mutually agreed solution to the dispute while a panel was already examining the matter.<sup>69</sup> Where parties settle the dispute before the panel circulates a report to the WTO Members, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

<sup>65</sup> See Chapter 3.4 of this Handbook.

<sup>66</sup> See, for example: Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (“US – Underwear”)*, WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31, Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico (“Guatemala – Cement I”)*, WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R, Panel Report, *India - Quantitative Restrictions*, Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (“US – Lead and Bismuth II”)*, WT/DS138/R and Corr.2, adopted 7 June 2000, as upheld by the Appellate Body Report, WT/DS138/AB/R.

<sup>67</sup> E.g., Panel Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products (“EC – Poultry”)*, WT/DS69/R, adopted 23 July 1998, as modified by the Appellate Body Report, WT/DS69/AB/R.

<sup>68</sup> WT/DS27/R/ECU; WT/DS27/R/GTM & HND; WT/DS27/R/MEX; and WT/DS27/R/USA.

<sup>69</sup> In *European Communities - Measures Affecting Butter Products*, complaint by New Zealand, WT/DS72, the parties reached a mutually agreed solution after the panel had issued its report to the parties.

Panel reports are always circulated to the WTO Members and made available to the public in English, French and Spanish. No report is circulated until all three language versions are available. Most reports are written in English and then translated into French and Spanish, but in recent years there have been a few panel reports that were written in Spanish and at least one that was written in French.<sup>70</sup>

## **4.7 Test your understanding**

- 1. Who has a right of access to the panel proceedings? On what legal basis does the Appellate Body conclude that panels have the right to accept and consider unsolicited *amicus curiae* briefs? Under what conditions may private lawyers represent in a panel meeting a WTO Member that is a party or third party in the dispute before the panel?**
- 2. How do panels interpret the provisions of the *WTO Agreement*? Should panels when interpreting the provisions of the *WTO Agreement* take into account the “legitimate expectations” of the complaining party or the negotiating history of the *WTO Agreement*?**
- 3. Can parties submit new evidence to the panel at any stage of the panel proceedings? Are parties under a legal obligation to provide to the panel the documents and information that the panel requests of them? Upon which party does the burden of proof rest in panel proceedings?**
- 4. Are the recommendations, rulings and suggestions of a panel report legally binding? What are the requirements that a panel report must meet under the DSU?**

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<sup>70</sup> E.g., Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (“EC – Asbestos”), WT/DS135/R, adopted 5 April 2001 as modified by the Appellate Body Report WT/DS135/AB/R.



## 5. THE PANEL PROCEEDINGS

### Objectives

**On completion of this section, the reader will be able: to identify the different steps in the panel proceedings; to interpret the DSU rules on working procedures for panels; and to recognize the time frames for the panel proceedings.**

### 5.1 Working Procedures

#### Article 12.1 DSU

The basic rules governing panel proceedings are set out in Article 12 of the DSU. Article 12.1 of the DSU directs a panel to follow the Working Procedures contained in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. In *India – Patents*, however, the Appellate Body cautioned panels as follows:

*... Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: “Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute”. Yet that is all that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU.<sup>71</sup>*

#### Article 12.2 DSU

The DSU requires that panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process. Since the Working Procedures contained in Appendix 3 are rudimentary, panels have often found it necessary to adopt additional procedures specific to the cases before them. These additional procedures are usually reported in an introductory section of the panel report on procedural aspects of the dispute.

#### Article 3.10 DSU

Generally speaking, WTO Members enjoy a high degree of discretion to argue dispute settlement claims in the manner they deem appropriate. This discretion, however, does not detract from their obligation under the DSU to engage in dispute settlement procedures “in good faith in an effort to resolve the dispute”. Both complaining and responding Members must comply with the requirements of the DSU in good faith. In *US – FSC* the Appellate Body stated:

*By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be*

<sup>71</sup> Appellate Body Report, *India – Patents*, para. 92.

*made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.*<sup>72</sup>

The Appellate Body has noted repeatedly that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings.<sup>73</sup>

The working languages of the WTO are English, French and Spanish. The parties may use any of the three languages in the proceedings. During the period 1995-2002, however, English was the language commonly used by the panel, the parties and third parties in panel proceedings.

## 5.2 Time Frame for the Panel Proceedings

### Article 12.8 DSU

The period in which a panel shall conduct its examination, from the date that the composition of the panel has been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months and shall make every effort to accelerate the proceedings to the greatest extent possible.

### Articles 12.9 and 4.9 DSU

When a panel considers that it cannot issue its report within six months, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it shall issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

### Article 12.9 DSU

### Article 20 DSU

The period from the date of establishment of the panel by the DSB until the date the DSB considers the panel report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where the panel has acted, pursuant to Article 12.9 of the DSU to extend the time for providing its report, the additional time taken shall be added to the above periods.

It should be noted that panels often find it impossible to complete their examination of the case within these nine months. They frequently go beyond this deadline. The reasons for delay vary but are often related to the complexity of the case and the need to consult experts, the availability of panelists, problems with scheduling meetings and the time taken up by the translation of the report.

### Article 12.12 DSU

At the request of the complaining party, the panel may at any time during the panel proceedings suspend its work for a maximum period of 12 months. If

<sup>72</sup> Appellate Body Report, *US – FSC*, para. 166. See also Appellate Body Report, *US – Lamb*, para. 115.

<sup>73</sup> See Appellate Body Report, *EC – Bananas III*, para. 144; Appellate Body Report, *India – Patents (US)*, para. 95; and Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79, footnote 68.

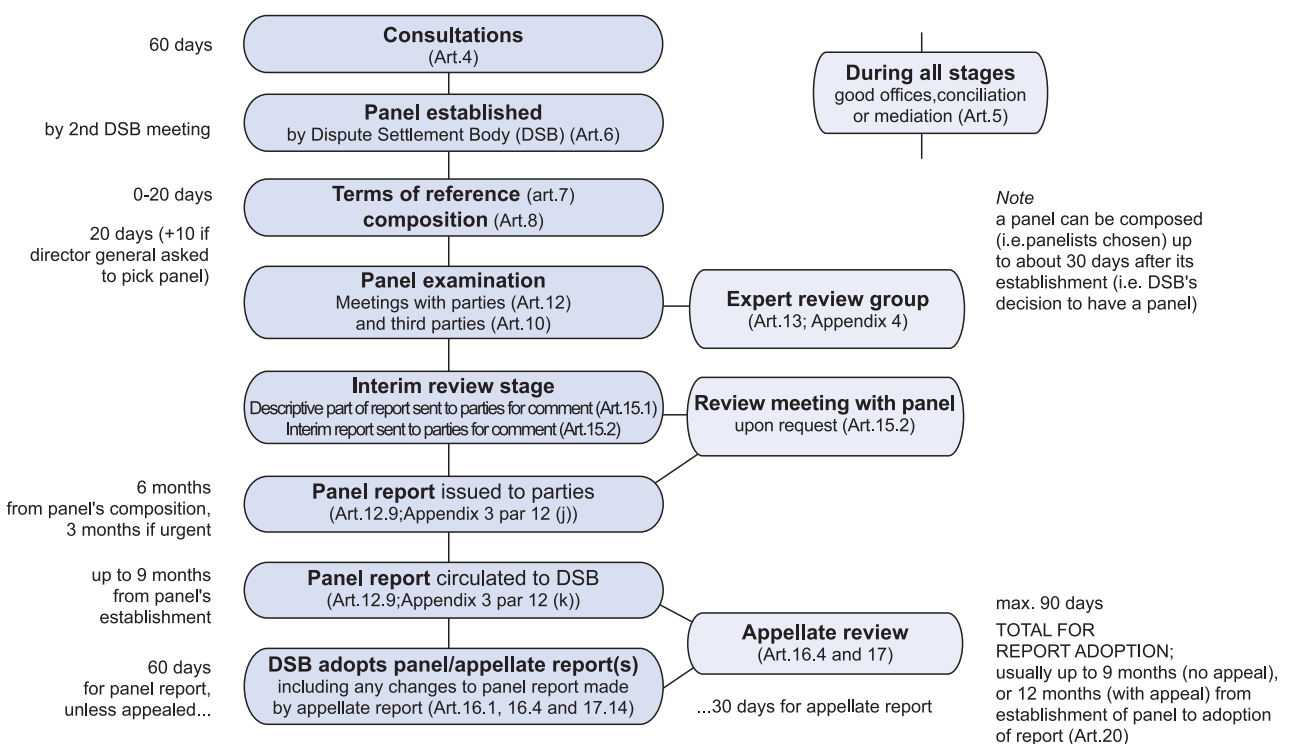
the work of the panel has been suspended for more than 12 months, the authority of the panel lapses.<sup>74</sup>

### Articles 4 and 7 SCM Agreement

Accelerated procedures with shorter time periods (generally half) apply with respect to disputes regarding prohibited subsidies under the *SCM Agreement*. Also disputes regarding actionable subsidies under the *SCM Agreement* are subject to some specific deadlines.<sup>75</sup>

## 5.3 Steps in the Panel Proceedings

The following flow-chart indicates the major steps in the panel's proceedings:



### 5.3.1 Organizational Panel Meeting

#### Article 12.3 DSU

Shortly after its composition, a panel will call a “organizational” meeting with the parties to consult with them on the timetable for the panel process and the working procedures. Subsequently, the panel will fix the timetable, and adopt, where necessary, *ad hoc* working procedures. Whenever possible, this should be done within one week after the panel is composed. As already mentioned,

<sup>74</sup> See e.g., United States - The Cuban Liberty and Democratic Solidarity Act (*Helms-Burton Act*), complaint by the European Communities, WT/DS38; and European Communities - Measures Affecting Butter Products, complaint by New Zealand, WT/DS72.

<sup>75</sup> See for more detail, Module 3.7 of this Course.

**Article 12.4 DSU**

the Working Procedures set out in Appendix 3 of the DSU provide for a proposed timetable for panel work. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions. The DSU explicitly stipulates that in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation.<sup>76</sup>

**Article 12.10 DSU****Article 9.2 DSU**

When a single panel examines complaints of multiple complainants, the panel must organize its examination in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired.

### **5.3.2 Written Submissions and Substantive Panel Meetings**

**Article 12.5 DSU**

As a rule, the parties to the dispute make two written submissions to the panel and the panel meets twice with the parties on the substance of this dispute. Exceptionally, panels convene additional meetings with the parties. The timetable for the panel process will set out precisely when the written submissions are due and when the panel meetings will take place. The parties are bound to respect the deadlines for their written submissions.

**DSU Appendix 3,  
para. 12**

Generally, parties will be required to file within five to nine weeks from the composition of the panel, their first written submissions. Usually the complainant makes its first submission in advance of the respondent's first submission. In their first written submissions, the parties present the facts of the case and their arguments.

**para. 4****para. 12**

After the filing of these first submissions of the parties, the panel holds, generally within one to two weeks of the filing of the written submission of the respondent, a first "substantive" (as opposed to "organizational") meeting with the parties. At this meeting, the panel asks the complainant to present its case. At the same meeting, the respondent is asked to present its own point of view. Third parties are invited to present their views during a special session of the first substantive meeting set aside for this purpose. As discussed above, the panel always meets with the parties in closed session.<sup>77</sup> Panel meetings are not open to the general public.

**para. 5****para. 6****para. 2****para. 12**

Within two to three weeks of the first substantive meeting, the parties file simultaneously their rebuttal submissions. These submissions, in which each party replies to the arguments and evidence submitted by the other parties, are submitted simultaneously. However, it is not uncommon for novel arguments to be made in these submissions.<sup>78</sup>

**Article 12.6 DSU****DSU Appendix 3,  
para. 12**

Generally, one to two weeks after the filing of the rebuttal submissions, the panel will have a second "substantive" meeting with the parties. The respondent

<sup>76</sup> E.g., *Panel Report, India – Quantitative Restrictions*, para. 5.10.

<sup>77</sup> See above, p. 22.

<sup>78</sup> See above, p. 23.

para. 7 shall have the right to take the floor first to be followed by the complaining party.

Article 18.1 DSU The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting or in writing. However, in the interest of due process and full transparency, the panel (or individual panelists) may not have any *ex parte* communications with any of the parties concerning matters under consideration by the panel. The panel may not meet with one of the parties without the other party or parties being present. All parties have the right to be present whenever another party presents its views to the panel. All written communications to and from the panel will always be copied, or otherwise made available, to all parties.

DSU Appendix 3, para. 10

Article 12.6 DSU Pursuant to the DSU each party to the dispute shall deposit its written submissions with the WTO Secretariat for immediate transmission to the panel and to the other party or parties. In practice, however, it is often agreed, and stipulated in the *ad hoc* working procedures for the panel, that each party shall serve its submissions directly on all other parties and confirm that it has done so at the time it provides its submission to the Secretariat.

Article 10.2 DSU As discussed above, any WTO Member having a substantial interest in a matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel and to make written submissions to the panel. These third parties to the dispute are invited by the panel to present their views during a special session of the first substantive meeting and the written submissions of third parties are given to the parties to the dispute. These submissions are also reflected in, or attached to, the panel report. Third parties only receive the first written submissions of the parties. Overall, the rights of third parties are very limited. In some cases, however, third parties have sought and obtained expanded third-party rights. In *EC – Bananas III*, for example, third party developing country Members that had a major interest in the outcome of this case, were allowed to attend all of the first and the second substantive meetings of the panel with the parties as well as make statements at both meetings.

The panel may request parties to provide the Secretariat with an executive summary of the claims and arguments contained in their written submissions. These summaries shall only serve the purpose of assisting the Secretariat in drafting a concise arguments section of the panel report. Panels that opt for attaching the written submissions to the panel report have of course no need for such executive summaries.

### 5.3.3 Drafting of the Panel Report

Article 14.1 DSU The deliberations of panels are confidential. Panel reports are drafted without the presence of the parties to the dispute in the light of the information provided and the statements made. Generally, the panelists will meet one or more times in Geneva to discuss the subsequent drafts of the report. Officials of the WTO Secretariat assist the panelists in the drafting of the report. The extent of the

Article 14.2 DSU

involvement of the WTO Secretariat may be significant but tends to vary considerably depending on panelists.<sup>79</sup>

The characteristics of a panel report have been discussed in detail above.<sup>80</sup>

#### **5.3.4 Interim Review**

##### **Article 15.1 DSU**

Once the panel has completed a draft of the descriptive (i.e., the factual and arguments) sections of its report, the panel issues this draft to the parties for their comments within two weeks.<sup>81</sup> Two to four weeks after the expiration of the time period for receipt of comments on the descriptive part, the panel subsequently issues to the parties an interim report, including both the descriptive sections and the panel's findings and conclusions. The parties are again invited to comment on the report, usually within one week. A party may submit a written request to the panel to review particular aspects of the interim report. At the request of a party, the panel may hold a further meeting with the parties on the issues identified in the written comments. Such interim review meetings are, however, rather exceptional.

##### **Article 15.2 DSU**

##### **Article 15.3 DSU**

The findings of the final panel report shall include a discussion of the arguments made at the interim review stage.

The comments made by parties at the interim review frequently give rise to corrections by the panel of technical errors or unclear drafting. However, panels have seldom changed the conclusions reached in their report in any substantive way as a result of the comments made by parties. Parties will sometimes also prefer to comment during the interim review stage only on minor factual issues, saving their legal arguments for a later appeal to the Appellate Body. This interim review is an unusual feature in judicial or quasi-judicial dispute settlement procedures. It is a clear left-over from by-gone times when trade dispute settlement was still more diplomatic in nature and the agreement of both parties was required for the panel report to become binding.

#### **5.3.5 Issuance and Circulation of the Final Report**

The final panel report is *first issued* to the parties to the dispute and some weeks *later*, once the report is available in the three working languages of the WTO, *circulated* to the general WTO Membership. Once circulated to WTO Members, the panel report is an unrestricted document available to the public. On the day of its circulation, a panel report is posted on the WTO website ([www.wto.org](http://www.wto.org)). Panel reports are also included in the official WTO *Dispute Settlement Reports*, published by Cambridge University Press.

<sup>79</sup> See above, p. 16.

<sup>80</sup> See above, p. 27-30.

<sup>81</sup> Where a panel decided to attach the written submissions of the parties to the report, the descriptive sections of its report become of course quite short.

### 5.3.6 *Adoption or Appeal*

#### Article 16.4 DSU

Within 60 days after the date of circulation of the panel report to WTO Members, the report is adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after they have been circulated.

#### Article 16.1 DSU

Since 1995 about three out of four panel reports have been appealed. During the first years of the WTO dispute settlement system the “appeals rate” was 100 per cent. In fact, all panel reports circulated before the end of March 1998 were appealed.<sup>82</sup>

#### Article 16.4 DSU

If a panel report is appealed, it usually is not discussed in the DSB until the time the Appellate Body report is discussed. The panel report will then be adopted by the DSB, as upheld, modified or reversed by the Appellate Body. If a panel report is not appealed, the DSB will consider and adopt the report within the period between day 20 and day 60 after the circulation of the report. The DSB adopts the report by reverse consensus. The adoption is therefore quasi-automatic.

#### Footnote 7 DSU

The adoption of the report will be put on the agenda of DSB meeting scheduled within the period between day 20 and day 60 after the circulation of the report. If no DSB meeting is scheduled in that period, a meeting of the DSB is held specifically to consider and adopt the report. Only WTO Members, and not the WTO Secretariat, may put the adoption of a panel report on the agenda of a DSB meeting. If no Member puts the adoption of a report on the agenda, the report will not be adopted and will therefore not become legally binding. To date, this only happened once.<sup>83</sup>

#### Article 16.3 DSU

When the DSB considers and debates the panel report, all Members, including the parties to a dispute, have the right to participate fully in the consideration of the report. Members that have objections to a panel report may give written reasons to explain their objections, which will be circulated to other Members.

#### Article 16.2 DSU

<sup>84</sup> Generally, the winning party will briefly praise the panel while the losing party will be more critical and lengthy, often repeating the legal and factual arguments submitted to, but rejected by, the panel. The views on the panel report expressed by the parties and other Members are fully recorded in the minutes of the meeting. The minutes of DSB meetings are initially restricted documents but are eventually made public.

#### Article 16.3 DSU

<sup>82</sup> *The first panel report not appealed was the report in Japan – Measures Affecting Consumer Photographic Film and Paper (“Japan – Film”), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179.*

<sup>83</sup> *Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities (“EC – Bananas III (Article 21.5 – EC)”), WT/DS27/RW/EEC and Corr.1, 12 April 1999.*

<sup>84</sup> *Such circulation must take place at least 10 days prior to the DSB meeting at which the panel report will be considered.*

## **5.4** Test your understanding

- 1. Briefly outline, step by step, the panel proceedings.**
- 2. What is the time frame within which the panel proceedings must be concluded? Do the parties have to agree to those provisions in the Panel's detailed working procedures that deviate from Article 12 and Appendix 3 of the DSU?**
- 3. If the panel needs further information on a highly technical aspect of the challenged measure may the panel then meet with the responding party alone? Is a panelist allowed to meet with the parties without the other panelists being present?**
- 4. At what moment in time can a panel report be appealed? Is a panel report that is appealed considered by the DSB for adoption? Is such report considered for adoption after the appellate review process is concluded?**
- 5. Can the adoption of a panel report be blocked?**



## 6. DEVELOPING COUNTRY MEMBERS

### Objectives

**On completion of this section, the reader will be able to appreciate the use made by developing country Members of consultation and the panel process to date, and the special and differential treatment provisions relating to panel proceedings applicable to developing country Members.**

### 6.1 Use of Consultations and the Panel Process

#### 6.1.1 Use as Parties

The WTO dispute settlement system has been used intensively by the major trading powers, and, in particular, the United States and the European Communities. Developing country Members, however, have also had frequent recourse to the WTO dispute settlement system, both to challenge trade measures of major trading powers and to settle trade disputes with other developing countries.

In the following disputes, for example, developing country Members successfully challenged a trade measure of a major trading power: *US – Gasoline*, complaints by Venezuela (WT/DS2) and Brazil (WT/DS4), *US – Underwear*, complaint by Costa Rica (WT/DS24), *US – Wool Shirts and Blouses*, complaint by India (WT/DS33), and *EC – Bananas III*, complaint by Ecuador, Guatemala, Honduras, Mexico (and the United States) (WT/DS27).

In the following disputes, for example, developing countries challenged trade measures of other developing countries: *Brazil – Desiccated Coconut*, complaint by the Philippines (WT/DS22); *Egypt – Steel Rebar*, complaint by Turkey (DS211); and *Turkey – Textiles*, complaint by India (DS34).

During the first seven years of the WTO dispute settlement system (1995-2001) in over 36 per cent of all cases brought to the WTO for resolution developing countries were complainants and in 39 per cent they were respondents.<sup>85</sup> In 2001, developing country Members filed more requests for consultations than did developed country Members. Over two thirds of the requests for consultation filed in 2001 were filed by developing country Members. The most active users of the dispute settlement system among developing country Members are Brazil, India, Mexico, Thailand and Chile. To date, no least developed country has brought a complaint to the WTO nor has been a respondent in a WTO dispute settlement proceeding.

#### 6.1.2 Use as Third Parties

Developing country Members have also frequently been third parties in panel

<sup>85</sup> See data on WTO dispute settlement at [www.wto.org](http://www.wto.org)

proceedings. In *EC – Bananas III*, for example, Belize, Cameroon, Colombia, Costa Rica, Côte d’Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Nicaragua, Saint Lucia, St. Vincent and the Grenadines, Senegal, Suriname and Venezuela, all participated in the panel proceedings as third parties. As already noted, these countries actually were granted extended third party rights in that they were entitled to attend all of the two substantive meetings with the panel and were allowed to make statements at these meetings.

Participation in the panel process as a third party may be a useful learning experience for developing country Members that have little expertise regarding the dispute settlement system.

## 6.2 Special Rules for Developing Country Members

The DSU recognises the special situation of developing and least-developed country Members. There are a number of DSU provisions that provide for special and differential treatment for developing country Members in the consultation and panel processes. Special rules for developing country Members in respect of consultations and the panel process are found in Articles 3.12, 4.10, 8.10, 12.10 and 12.11 of the DSU. Article 24 of the DSU provides for further special rules for the least developed among the developing country Members. Many of these provisions have already been referred to and discussed above and will only be addressed briefly in this section.<sup>86</sup>

### 6.2.1 Developing Country Members

#### Article 3.12 DSU

#### 1966 Decision

Article 3.12 of the DSU allows a developing country Member that brings a complaint against a developed country Member to invoke the provisions of the Decision of 5 April 1966 of the GATT Contracting Parties.<sup>87</sup> These provisions may be invoked as an “alternative” to the provisions contained in Articles 4, 5, 6 and 12 of the DSU. The 1966 Decision provides, first, that where consultations between the parties have failed, the Director General may, *ex officio*, use at the request of the developing country party to the dispute, his good offices and conduct consultations with a view to facilitating a solution to the dispute. Under the GATT 1947, developing country Members made use five times of the Director General’s good offices under the 1966 Decision. Second, if these consultations conducted by the Director-General do not result in a mutually satisfactory solution within a period of two months, the Director-General will, at the request of one of the parties, submit a report on the action undertaken by him to the DSB<sup>88</sup>. The DSB will then forthwith appoint a panel in consultation with, and with the approval of, the parties. Third, the panel must take due account of all the circumstances and considerations relating to the application of the measures complained of, and their impact on the trade and economic development of the affected Members. Finally, the panel must submit its report to the DSB within a period of 60 days

<sup>86</sup> See above, p. 4,5,9,21,28,34 and 35.

<sup>87</sup> Decision of 5 April 1966 on Procedures under Article XXIII, BISD 14S/18.

<sup>88</sup> The 1966 Decision referred to the Contracting Parties and the GATT Council.

from the date the dispute was referred to it. However, the DSU provides that where the panel considers that this 60-day time frame is insufficient to provide its report, that time frame may, with the agreement of the complaining party, be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter prevail.

**Article 3.12 DSU**

To date no developing country has invoked the provisions of the 1966 Decision. The reason for this lack of enthusiasm for the provisions of the 1966 Decision is undoubtedly that the DSU provisions afford developing country complaining parties treatment at least as favourable, if not more favourable, than the treatment afforded by the 1966 Decision.

**Article 4.10 DSU**

With regard to consultations with a view to reach a mutually acceptable solution, Article 4.10 of the DSU provides that during consultations WTO Members should give special attention to the particular problems and interests of developing country Members. Article 12.10 of the DSU adds to this that in consultations on a measure taken by a developing country Member, the parties to the dispute may agree to extend the 60-day time frame for consultations. If the parties cannot agree on such extension, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long.

**Article 12.10 DSU**

**Article 8.10 DSU**

With regard to the composition of panels, Article 8.10 of the DSU provides that in a dispute between a developed and a developing country Member, the panel must, if the developing country Member so requests, contain at least one panelist from a developing country. In the vast majority of disputes involving developing countries, nationals from developing country Members have served on the panel.<sup>89</sup>

**Article 12.10 DSU**

With regard to the panel process, Article 12.10 of the DSU provides that in a dispute concerning a measure of a developing country Member, the panel shall accord sufficient time for a developing country Member to prepare and present its arguments. In *India – Quantitative Restrictions*, India requested from the Panel additional time in order to prepare its first written submission. Referring to the DSU's strict time frame for the panel process, the United States objected to this request. The Panel ruled as follows:

*The Panel has carefully reviewed the arguments of the parties. The Panel notes that India could have raised several of the reasons mentioned in its letter during the organizational meeting held on 27 February 1998. However, pursuant to Article 12.10 of the DSU, "in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation." In light of this provision, and considering the administrative reorganization taking place in India as a result of the recent change in government, the Panel has decided to grant an additional period of time to India to prepare its submission.*

<sup>89</sup> See above, p. 9.

*However, bearing in mind also the need to respect the time frames of the DSU and in light of the difficulties of rescheduling the meeting of 7 and 8 May, the Panel considers that an additional period of ten days would represent “sufficient time” within the meaning of Article 12.10 of the DSU. India is therefore granted until 1 May 1998 (5 p.m.) to submit its first written submission to the Panel. The original date of the first meeting remains unchanged as 7 and 8 May.<sup>90</sup>*

#### **Article 12.11 DSU**

With regard to the panel report, Article 12.11 of the DSU provides that where one or more of the parties is a developing country Member, the report of the panel must explicitly indicate the form in which account has been taken of relevant WTO provisions on differential and more-favourable treatment for developing country Members which have been raised by the developing country Member in the course of the dispute settlement procedures.<sup>91</sup>

#### **Article 27.2 DSU**

As discussed in more detail in Module 3.1, “The World Trade Organization and its Dispute Settlement System”, the WTO Secretariat must make available a qualified legal expert to any developing country Member which so requests. This expert must, however, assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat. The expert, therefore, can only be involved in pre-litigation phase of a dispute. Of much more use to developing countries during the consultation and panel processes will be the Advisory Centre on WTO Law, also discussed in detail in Module 3.1.

### **6.2.2 Least Developed Country Members**

#### **Article 24.1 DSU**

With regard to the least developed countries, Article 24.1 of the DSU provides that particular consideration must be given at all stages of dispute settlement procedures and, therefore, also during the consultations and panel process, to the special situation of least developed countries. WTO Members are required to exercise due restraint in initiating dispute settlement proceedings against least developed countries. As noted above, to date no dispute settlement proceedings have been initiated against any least developed country Member.

#### **Article 24.2 DSU**

Also with regard to the least developed countries, Article 24.2 of the DSU provides, as already discussed above, that in a case in which consultations fail to result in a mutually agreed solution, the Director-General or the Chairman of the DSB must, at the request of the least developed countries involved, offer their good offices, conciliation and mediation to help the parties to the dispute to reach a mutually agreed solution.<sup>92</sup>

### **6.2.3 Hortatory Provisions?**

For the most part, the special and differential treatment provisions have not been much used to date, except for the right of developing country parties to

<sup>90</sup> *Ruling of the Panel, dated 15 April 1998, as reported in the Panel Report, para. 5.10.*

<sup>91</sup> *See above, p. 28.*

<sup>92</sup> *See above, p. 6.*

request that one member of a panel be from a developing country. Developing country Members have argued that there was no certainty that special and differential treatment would in fact be accorded to them under many of these provisions because they were considered to be hortatory only.

### **6.3** Test your understanding

- 1. What is the significance of the Decision of 5 April 1966 on Procedures under Article XXIII for WTO dispute settlement?**
- 2. Are developing country Members entitled under the DSU to extra time to prepare submissions and panel meetings?**
- 3. Are there any special rules for the least-developed country Members?**

## 7. CASE STUDIES

1. To protect its ailing steel industry from import competition, the Kingdom of Richland, a WTO Member, imposed a quota on imports of steel from the Republic of Newland, a developing country WTO Member. The Government of Newland decides to challenge the WTO consistency of this quota and, since it is important to act quickly, intends to put its request for the establishment of a panel on the agenda of the next meeting of the DSB. Does Newland act in accordance with the DSU by immediately requesting the establishment of a panel? If not, could the DSB refuse to establish the panel?
2. Richland's Permanent Representative to the WTO received instructions from his Government to block or, if that is impossible, to delay as much as possible, the establishment and composition of a panel. What can the Permanent Representative of Richland do? The Permanent Representative of Newland, on the contrary, received instructions not to accept any delay in the process of establishing and composing the panel. Her Government insists that the panel include five members of whom at least one is a national of Newland and two are nationals of other developing country Members. Among the five panelists, it wants two economists specialized in the economic development of developing countries. None of the panelists should be a former or current Geneva diplomat or a former or current official of the WTO Secretariat. The instructions of the Government of Newland are not to agree to a panel the composition of which does not meet these "requirements". What can the Permanent Representative of Newland do?
3. Five weeks after the Panel has started its work and shortly before it is to receive the first written submissions of Newland, the lawyers of Richland discover that the spouse of one of the panelists has shares in a holding company that has invested in a steel company established in Newland. They also discover that a few years ago another panelist had written a scholarly article on one of the legal questions at issue in this dispute. What steps, if any, can Richland undertake?
4. In its first written submission, Newland requests the Panel to examine not only the quotas on steel but also quotas on cement that were recently introduced by Richland. Newland also wants the Panel to find that the quotas on steel are not only in breach of Article XIX of the GATT 1994 and the *Agreement on Safeguards* (as it had stated in its panel request) but also in violation of the *Agreement on Import Licensing Procedures*. Finally, Newland calls upon the Panel to examine *de novo* whether the imports of steel from Newland did indeed cause or threaten to cause serious injury to the domestic steel industry of Richland. On the contrary, Richland wants the Panel to rule only on the consistency of the quota with the *Agreement on Import Licensing Procedures*. How should the Panel react to these demands by Newland and Richland?

5. *FerMetal*, the largest steel producer in Richland, *NASP*, the National Association of Steel Producers of Richland and *Fair Deal*, a non-governmental organization that focuses on the problems of developing countries, have all sent to the Chairman of the Panel an *amicus curiae* brief. The brief of *NASP* had been published in the *Financial Times* and the *Wall Street Journal* a week earlier and had received a lot of attention. What should the Panel do with these briefs?
6. Newland argues in its first written submission that the Panel should interpret the provisions of the *Safeguard Agreement* in the light of the object and purpose of the *WTO Agreement* and in the light of the alleged intention of the negotiators to limit the use of safeguard measures. After the second substantive meeting with the Panel, Newland submits to the Panel a 100-page document on the Uruguay Round negotiations, which it claims supports its position. The Panel would like to get the advice of a number of eminent international trade law scholars and of former Uruguay Round negotiators on this issue. What can the Panel do?
7. Newland argues before the Panel that since the introduction of quotas is inconsistent with the basic prohibition of quantitative restrictions set out in Article XI of the GATT 1994 and that Article XIX of the GATT 1994 therefore constitutes an exception to a basic prohibition, the burden is on Richland to demonstrate that it has acted consistently with its obligations under Article XIX of the GATT 1994. On whom does the burden of proof rest in this dispute?
8. At the request of Newland, the Panel provides in its Working Procedures that Newland, in recognition of its status of developing country Member, may bring new claims until the first substantive meeting with the Panel. The Panel also decides that, in view of the complexity of the matter, the time frame for the panel process will be 20 months from the date of the composition of the Panel. Richland challenges the first decision, Newland the second. Should the Panel revoke one or both of these decisions?
9. The Permanent Representative of Newland received instructions from her Government to use to the fullest all special and differential treatment provisions relating to consultations and the panel process. What can she hope for? Would the situation be different if Newland were the responding party? Will the use of the special and differential treatment provisions substantially change the panel process? Is there need and/or justification for special and differential treatment for developing country Members that would substantially change the panel process in their “favour”?

## 8. FURTHER READING

### 8.1 Articles

- **Bronckers, M. and Jackson, J.**, “Outside Counsel in WTO Dispute Processes”, *Journal of International Economic Law*, 1999, 155.
- **Cottier, T.**, “The WTO Dispute Settlement System: New Horizons”, *Proceedings of the 92<sup>nd</sup> Annual Meeting ASIL (1998)*, 86.
- **Davey, W.**, “The WTO Dispute Settlement System”, *Journal of International Economic Law*, 2000, 15.
- **Feliciano, F. and Van den Bossche, P.**, “The Dispute Settlement System of the World Trade Organisation: Institutions, Process and Practice”, in Blokker, N. and Schermers, H.G., *Proliferation of International Organisations* (Kluwer Law International, 2001), 297-350
- **Footer, M.**, “Developing Country Practice in the Matter of WTO Dispute Settlement”, *Journal of World Trade*, 2001, 55-98.
- **Hudec, R.**, “The New WTO Dispute Settlement Procedure: An Overview of the First Three Years”, *Minn. J. Global Trade*, 1999, 1.
- **Jackson, J.**, “Dispute Settlement and the WTO: Emerging Problems”, *Journal of International Economic Law*, 1998, 329.
- **Marceau, G.**, “Rules on Ethics for the New World Trade Organisation Dispute Settlement Mechanism – The Rules of Conduct for the DSU”, *Journal of World Trade*, 1998, No.3, 57.
- **Pauwelyn, J.**, “Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?”, *Journal of International Economic Law*, 1998, 227.

**Van den Bossche, P. and Marceau, G.**, “Le système de règlement des différends de l’Organisation mondiale du commerce: Analyse d’un système particulier et distinctif”, *Revue du Marché Unique Européen*, 1998, 29.

### 8.2 Appellate Body Reports

- Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* (“*Argentina – Footwear (EC)*”), WT/DS121/AB/R, adopted 12 January 2000.
- Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (“*Argentina – Textiles and Apparel*”), WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003.
- Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* (“*Australia – Salmon*”), WT/DS18/AB/R, adopted 6 November 1998.



- Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* (“*Brazil – Aircraft*”), WT/DS46/AB/R, adopted 20 August 1999.
- Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* (“*Brazil – Desiccated Coconut*”), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167.
- Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (“*Canada – Aircraft*”), WT/DS70/AB/R, adopted 20 August 1999.
- Appellate Body Report, *Chile – Taxes on Alcoholic Beverages* (“*Chile – Alcoholic Beverages*”), WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000.
- Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R.
- Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (“*EC – Asbestos*”), WT/DS135/AB/R, adopted 5 April 2001.
- Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (“*EC – Bananas III*”), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.
- Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (“*EC – Computer Equipment*”), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998.
- Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* (“*EC – Hormones*”), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
- Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* (“*EC – Poultry*”), WT/DS69/AB/R, adopted 23 July 1998.
- Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (“*India – Patents (US)*”), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9.
- Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (“*India – Quantitative Restrictions*”), WT/DS90/AB/R, adopted 22 September 1999.
- Appellate Body Report, *Japan – Measures Affecting Agricultural Products* (“*Japan – Agricultural Products II*”), WT/DS76/AB/R, adopted 19 March 1999.
- Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* (“*Japan – Alcoholic Beverages II*”), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.
- Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* (“*Korea – Alcoholic Beverages*”), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999.

- Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (“Korea – Dairy”), WT/DS98/AB/R, adopted 12 January 2000.
- Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (“Thailand – H-Beams”), WT/DS122/AB/R, adopted 5 April 2001.
- Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations”* (“US – FSC”), WT/DS108/AB/R, adopted 20 March 2000.
- Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (“US – Gasoline”), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
- Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (“US – Hot-Rolled Steel”), WT/DS184/AB/R, adopted 23 August 2001.
- Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (“US – Lamb”), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.
- Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (“US – Lead and Bismuth II”), WT/DS138/AB/R, adopted 7 June 2000.
- Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“US – Shrimp”), WT/DS58/AB/R, adopted 6 November 1998.
- Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* (“US – Underwear”), WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11.
- Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (“US – Wheat Gluten”), WT/DS166/AB/R, adopted 19 January 2001.
- Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (“US – Wool Shirts and Blouses”), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

### 8.3 Panel Reports

- Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* (“Argentina – Footwear (EC)”), WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R.
- Panel Report, *Brazil – Export Financing Programme for Aircraft* (“Brazil – Aircraft”), WT/DS46/R, adopted 20 August 1999, as

modified by the Appellate Body Report, WT/DS46/AB/R.

- Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (“*Canada – Aircraft*”), WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R.
- Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities* (“*EC – Bananas III (Article 21.5 – EC)*”), WT/DS27/RW/EEC and Corr.1, 12 April 1999.
- Panel Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* (“*EC – Poultry*”), WT/DS69/R, adopted 23 July 1998, as modified by the Appellate Body Report, WT/DS69/AB/R.
- Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* (“*Guatemala – Cement I*”), WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R.
- Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (“*India – Quantitative Restrictions*”), WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R.
- Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* (“*Japan – Film*”), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179.
- Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (“*US – Lead and Bismuth II*”), WT/DS138/R and Corr.2, adopted 7 June 2000, as upheld by the Appellate Body Report, WT/DS138/AB/R.
- Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* (“*US – Underwear*”), WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31.
- Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (“*US – Wool Shirts and Blouses*”), WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R and Corr.1, DSR 1997:I, 343.