

DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION ¹

The dispute settlement procedure of the World Trade Organization (WTO) is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). With certain exceptions, the DSU is uniformly applicable to differences that arise in the context of all WTO agreements. In some cases, the “Special or Additional Rules and Procedures Contained in the Covered Agreements” apply (article 1.2 and appendix 2 of the DSU).

WTO demands that all its Members respect the rules in the interests of a safer and more reliable multilateral trade system. In this sense, WTO Members have agreed that, when they judge that other Members have broken trade rules, they shall refer the matter to the dispute settlement mechanism rather than adopting unilateral measures. This involves complying with the agreed procedures and respecting the decisions reached by the dispute settlement bodies set up for that purpose.

Forum / Jurisdiction

The WTO dispute settlement system has jurisdiction over any difference that may arise between Member countries, above and beyond the provisions of any of the “Covered Agreements” provided for in appendix 1 of the DSU. That is to say, a dispute based on the violation of WTO rules can only be dealt with by the multilateral forum, rather than by regional dispute settlement mechanisms.

Bodies

WTO bodies include the political institution known as the Dispute Settlement Body (DSB) and the independent and quasi-judicial institutions that are the Panels, the Appellate Body and Arbitrators:²

I – Dispute Settlement Body (DSB) - article 2 of the DSU

- Comprises a chairman (head of the permanent mission of one of the Member countries appointed by consensus among the Members of WTO) and representatives of all WTO Members (government representatives, usually diplomats who belong to ministries of trade or foreign affairs). In their capacity as government officials, the representatives receive instructions from their governments on the positions they must adopt and the statements they must make within the DSB, hence the latter is considered a political body.
- The DSB is responsible for the application of the DSU, in other words it oversees the entire dispute settlement procedure. It has the authority to set up panels, adopt panel and Appellate Body reports, monitor the application of recommendations and authorize retaliatory measures when a Member fails to comply with rulings.
- The DSB usually meets once a month, and the Director-General may convene extraordinary meetings at the request of Members. The staff of the WTO Secretariat provide administrative support to the DSB.
- As a general rule, the DSB makes decisions by consensus. However, when the DSB sets up panels, adopts reports or authorizes retaliation, the decision is automatically considered to be adopted, unless there is a consensus to the contrary (a negative consensus).

¹ This information comes from the official WTO website: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#intro.

² The full WTO dispute settlement process involves parties and third parties, the Dispute Settlement Body, Panels, the Appellate Body, WTO Secretariat, arbitrators, independent experts and various specialized agencies.

II – Director-General and Secretariat of WTO

- The Director-General of WTO participates in the Dispute Settlement Body (DSB) in the following ways: The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute (article 5.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)), especially in cases involving a less developed country;

If there is no agreement on the panelists, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall convene DSB meetings and determine the composition of the panel (article 8.7);

The Director-General appoints an Arbitrator to determine a reasonable period of time if the parties are unable to agree on a period of time or the appointment of an Arbitrator (article 21.3 c);

The Director-General shall examine proposed retaliatory measures in cases of non-implementation (article 22.6).

Within the Dispute Settlement Body (DSB), the Secretariat can act in the following ways (article 27):

Reports to the Director-General; provides assistance in respect of dispute settlement to Members at their request; organizes special training courses and provides additional legal advice and assistance to developing country Members; provides assistance to parties in the formation of panels; and helps established panels and provides administrative support to the DSB.

III - Panels - articles 6, 7 and 8 of the DSU

- Panels are quasi-judicial bodies responsible for settling differences between Members in the first instance.

- They comprise three, and in exceptional cases five, experts specially selected for each case (there is no permanent panel, but rather a different one is set up for each case). WTO Members regularly put forward names to be included in the list kept by the Secretariat. People appointed to a panel provide their services independently, in an individual capacity, and not as a representative of any government or organization.

IV – Appellate Body - article 17 of the DSU

- Unlike the panels, the Appellate Body is a standing body made up of seven members appointed by the DSB by consensus and for a period of four years, with a maximum of two terms. The Appellate Body examines the legal aspects of panel reports (rather than studying evidence or facts), and represents the second and final instance of the legal process.

V - Arbitrators - article 25 of the DSU

- Arbitration is an alternative means of dispute settlement to panels and the Appellate Body. Arbitrators can thus be called on to resolve certain issues at various stages of the dispute settlement process (when there is no agreement on determining the reasonable period of time or on the level of retaliation). Arbitral awards are not subject to appeal and may be enforced by the DSB.

VI - Experts - article 13 and appendix 4 of the DSU

- Panels may seek the opinions of experts in dealing with technical or scientific issues, such as when the case relates to the Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade, or the Agreement on Subsidies and Countervailing Measures.

- Groups of experts act under the authority of the panel, and provide the latter with their opinion. These groups carry out a purely consultative role. The final decision on legal issues and fact-finding, based on expert opinion, remains with the panel.

The dispute settlement procedure in full

Pre-litigation stage

Consultations: A filing of a “Request for Consultations” is the official beginning of the dispute within WTO and brings the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) into play. Consultations provide parties with the opportunity to debate the issue and find a satisfactory solution without resorting to litigation. The party complained against must reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request. If the Member does not comply with this time frame, then the Member that requested the holding of consultations may proceed directly to the litigation stage and request the establishment of a panel. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel (article 4.7). However, governments are in permanent contact, and agreement may be reached at any stage of the process (article 4). Along with good offices, conciliation and mediation, consultations are the main non-judicial or diplomatic instrument in the WTO dispute settlement system.

Litigation stage

1st stage (panel): If the consultations fail to settle a dispute, the complaining party may request establishment of a panel by the Dispute Settlement Body (DSB). The panel must be established within 45 days of the request. Once established, the panel must produce a report for the DSB within six to nine months. This report must include an objective assessment of the facts of the case and an examination of the measures in dispute, using the relevant provisions of the appropriate legal instruments.

2nd stage (optional recourse to the Appellate Body): The Appellate Body examines the legal aspects of the challenge and may uphold, modify or reverse the legal findings and conclusions of the panel (article 17.13).

According to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), parties may adopt three positions in relation to reports:

Implementation: it is insisted that the party failing to fulfil its obligations comply with the recommendations of the panel or Appellate Body. When it is impossible to do so immediately, the DSB may establish a reasonable period of time for implementation.

Payment of compensation: when the offending party exceeds the reasonable period of time without implementing the recommendations or determinations, the complainant may ask for compensation. The offending party may also offer compensation.

Retaliatory measures: when the offending party fails to comply with recommendations and refuses to offer compensation, the affected party may request DSB authorization to introduce retaliatory measures against the offending country. In principle, these measures must be applicable in the same sectors in which the panel has established the existence of an offence. Only if this were considered impossible would could the application of retaliatory measures in other sectors of the same agreement be authorized.

In any event, the above-mentioned measures (compensation or retaliation) are considered temporary measures, as the offending country is expected to fully adopt the recommendations or determinations formulated by the panel or Appellate Body.

Summary of time periods within the dispute settlement mechanism

Time scale	Actions
60 days	Consultations, mediation, etc.
45 days	Establishment of panel and appointment of members
6 months	Panel presents its final report to parties
3 weeks	Panel presents its final report to WTO Members
60 days	Dispute Settlement Body (DSB) adopts report (in the absence of an appeal)
total = 1 year	If no appeal
60 to 90 days	Appellate review report
30 days	DSB adopts the Appellate review
total = 1 year and 3 months	If a party appeals

Source: Understanding the WTO: settling disputes (http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

Specificities of the system

In terms of developing country Members of WTO, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) takes into account their particular situation. Within the dispute settlement system, the special and differentiated treatment they receive consists in additional or privileged procedures such as longer time periods.