THE DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANIZATION: INSTITUTIONS, PROCESS AND PRACTICE

Florentino P. Feliciano and Peter L.H. Van den Bossche

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INTRODUCTION

Since its establishment on 1 January 1995, the World Trade Organization (the "WTO"), now 136 Members strong, has been the focal point of action and reaction by governments and civil society concerning international trade and economic globalization. Perhaps more than any other international organization in recent years, the WTO has engaged popular and scholarly attention. Much of that attention has been and is focused upon the WTO's unique dispute settlement system. The issues involved in some of the disputes brought to the WTO for resolution have deeply engaged public opinion in the countries concerned and have precipitated political debate. This has been the case, for example, with regard to the dispute on the European Union's preferential import regime for

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The scholarly literature on the WTO dispute settlement system has reached very impressive proportions. The limited objectives of the authors' presentation and very practical contraints prevent, however, any systematic reference to this important literature. Accordingly, the authors have opted to focus instead on the growing WTO jurisprudence and to refer the interested reader to the selected bibliography appended to this article. This article covers developments until January 2000 although, occasionally, reference is made to later developments.

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bananas[1], the dispute on the European Union's import ban on meat from cattle treated with growth hormones[2], the dispute on the United States' import ban on shrimp harvested with nets not equipped with turtle excluder devices (TEDs)[3], the dispute on the United States' special tax treatment of export-related earnings of foreign sales corporations (FSCs)[4], the dispute on India's import restrictions for balance-of-payments purposes on 2700 different products[5], the disputes on Canada's and Brazil's subsidies for the export of aircraft[6] and the disputes on Japan's, Korea's and Chile's domestic taxes on alcoholic beverages.[7]

During the first five years of its operation, the WTO dispute settlement system has in many respects been a remarkable success and has become the "centrepiece" of the WTO. As of 1 January 2000, WTO Members had made 185 requests for consultations, the first and indispensable step in the WTO dispute settlement process[8] and the Dispute Settlement Body of the WTO had adopted the recommendations and rulings set out in Appellate Body and/or panel reports in 27 distinct disputes.[9] During the same five-year period, a total of 24 international disputes were brought to the International Court of Justice and the

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[1] European Communities - Regime for the Importation, Sale and Distribution of Bananas ("European Communities – Bananas"), complaint by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27).

[2] EC Measures concerning Meat and Meat Products (Hormones) ("European Communities – Hormones"), complaints by the United States (WT/DS26) and Canada (WT/DS48).

[3] United States – Import Prohibition of Certain Shrimp and Shrimp Products ("United States – Shrimp"), complaint by India, Malaysia, Pakistan and Thailand (WT/DS58).

[4] United States – Tax Treatment for "Foreign Sales Corporations" ("United States – FSC"), complaint by the European Communities (WT/DS108).

[5] India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products ("India – Quantitative Restrictions"), complaint by the United States (WT/DS90).

[6] Brazil – Export Financing Programme for Aircraft ("Brazil – Aircraft"), complaint by Canada (WT/DS46) and Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft"), complaint by Brazil (WT/DS70).

[7] Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages"), complaints by the European Communities (WT/DS8), Canada (WT/DS10) and the United States (WT/DS11); Korea - Taxes on Alcoholic Beverages ("Korea – Alcoholic Beverages"), complaints by the European Communities (WT/DS75) and the United States (WT/DS84); and Chile - Taxes on Alcoholic Beverages ("Chile – Alcoholic Beverages"), complaint by the European Communities (WT/DS110).

[8] The number of requests for consultations increased from 25 in 1995 to 39 in 1996 and 50 in 1997 and then fell in 1998 to 41 and in 1999 to 30.

[9] The Dispute Settlement Body adopted the recommendations and rulings set out in Appellate Body and/or panel reports in 2 disputes in 1996, 5 disputes in 1997, 11 disputes in 1998 and 10 disputes in 1999.

Court delivered 6 judgments and 1 advisory opinion.[10] The International Tribunal for the Law of the Sea delivered one judgment.[11] Of all international dispute settlement systems, the WTO system appears at present to be the most frequently used system.

The WTO dispute settlement system has been used intensively by the major trading powers, and, in particular, the United States and the European Communities.[12] Of the 185 requests for consultations made over the past five years, 30 percent were made by the United States and 24 percent by the European Communities. Developing country Members have, however, also had recourse to the WTO dispute settlement system, both to challenge trade measures of major trading powers[13] and to settle trade disputes with other developing countries.[14] Of the 185 requests for consultations, 45 were requests from developing countries.[15]

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[10] *See* http://www.icj_cij.org.

[11] M/V "Saiga" (No. 2) case (SAINT VINCENT AND GRENADINES v. GUINEA) (July 1, 1999), at http://www.un.org/Depts/los/JTLOS/ITCOSproc.htm.

[12] Pursuant to art. XI of the Marrakesh Agreement Establishing the World Trade Organization (the "*WTO Agreement*"), the European Communities is a Member of the WTO. We will, therefore, refer to the European Communities, rather than the European Union, as an actor within the WTO dispute settlement process. The 15 Member States of the European Union are also Members of the WTO. None of the EU Member States of the Union has ever brought a complaint to the WTO for resolution. A number of complaints, however, have been brought against individual EU Member States (for example, *Portugal – Patent Protection under the Industrial Property Act*, complaint by the United States (WT/DS37), *United Kingdom – Customs Classification of Certain Computer Equipment*, complaint by the United States (WT/DS62); *Ireland – Customs Classification of Certain Computer Equipment*, complaint by the United States (WT/DS67); *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights*, complaint by the United States (WT/DS86) and *Belgium – Measures Affecting Commercial Telephone Directory Services*, complaint by the United States (WT/DS80).

[13] See United States – Standards of Reformulated and Conventional Gasoline ("United States – Gasoline"), complaints by Venezuela (WT/DS2) and Brazil (WT/DS4), United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear ("United States – Underwear"), complaint by Costa Rica (WT/DS24, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India ("United States – Shirts and Blouses"), complaint by India (WT/DS33), and European Communities – Regime for the Importation, Sale and Distribution of Bananas, complaint by Ecuador., Guatemala, Honduras, Mexico and the United States (WT/DS27). In all these disputes the complainants successfully challenged the trade measure of a major trading power.

[14] See, e.g., Brazil – Measures Affecting Desiccated Coconut ("Brazil – Coconut"), complaint by the Philippines (WT/DS22).

[15] The number of requests for consultations by developing country Members has remained more or less stable over the past five years: 1995, 11 requests, 1996, 9 requests, 1997, 10 requests, 1998, 8 requests and 1999, 7 requests. The number of requests of developed country

The most active users of the dispute settlement system among developing country Members are India, Brazil and Mexico. Thus far, no least developed country has brought a complaint to the WTO. During the period from 1 January 1995 to 31 December 1999, a total of 33 WTO Members brought at least one complaint to the WTO by making a request for consultations.[16] The relatively frequent recourse to the WTO dispute settlement system during the first five years of its operation is commonly taken as a reflection of the confidence of WTO Members in this system and as one measure of its utility for such Members.

Another, and perhaps more important, aspect of the WTO dispute settlement system has been its ability to bring disputes to a resolution. While in a fair number of the 185 disputes brought to the WTO over the past five years, consultations are still being held or adjudication proceedings still pending, on 31 December 1999, 77 disputes (41.7 percent) have been resolved. Of these 77 disputes, 41 disputes (22.2 percent) were resolved without actual recourse to adjudication, usually through a mutually agreed solution reached between the parties[17], and 36 disputes (19.5 percent) resulted in the adoption by the Dispute Settlement Body (DSB) of legally binding recommendations and rulings set out in Appellate Body and/or panel reports. In a few highly visible disputes, such as the disputes on the European Union's preferential import regime for bananas and its import ban on meat from cattle treated with growth hormones, the implementation of the recommendations and rulings of the DSB has been problematic. For these situations, the WTO dispute settlement system provides a special mechanism to encourage a reluctant Member to implement the recommendations and rulings of the DSB.[18] However, in most disputes in which the time for implementation of the recommendations and rulings has expired, compliance with the DSB's recommendations and rulings has been timely and to the satisfaction of the complaining party.

The WTO dispute settlement system, set out in 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") is one of

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Members, on the contrary, have had a less tranquil evolution: 1995, 13 requests, 1996, 27 requests, 1997, 40 requests, 1998, 33 requests and 1999, 22 requests.

[16] The most frequent respondents are the United States and the European Communities. 19 percent of all complaints concern trade measures of the United States and 16 percent concern trade measures of the European Communities or of the Member States of the European Union. Of all complaints brought to the WTO, 38 percent concerned trade measures of developing country Members. India, Korea, Argentina and Brazil have been the most frequent respondents among the developing country Members.

[17] Mutually agreed solutions were reached in 30 disputes. In other disputes, the contested measure or the request for the establishment of a panel was withdrawn.

[18] *Infra.*, p. 39.

the most important results of the GATT Uruguay Round of negotiations on the liberalization of international trade (1986-1994).[19] The WTO dispute settlement system is, however, not a totally novel system for the resolution of trade disputes. It is built on the dispute settlement system of the GATT, which over a period of almost 50 years evolved in a most pragmatic manner on the basis of Articles XXII and XXIII of the GATT 1947 from diplomatic, power-based dispute settlement towards a more judicial, rules-based dispute resolution system.[20] The WTO system has taken on board the invaluable experience of the GATT with trade dispute settlement.[21] In Article 3.1 of the DSU, WTO Members explicitly "affirm their adherence to the principles for the management of disputes ... applied under Articles XXII and XXIII of GATT 1947". The adoption of the DSU and the introduction of the WTO dispute settlement system constituted, however, a dramatic development in the process of judicialisation of the settlement of international trade disputes. The WTO system continues to move towards a more judicial type of process. The rulings of the Appellate Body on a large number of procedural and systemic issues constitute an increasing body of judicial practice and procedure tending to fortify the rules-based character of the WTO system.[22]

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[19] The Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU, is attached as Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), done 15 April 1994, published in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Cambridge University Press, 1999) 354-379. The rules and procedures of the WTO dispute settlement system are further set out in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1, 11 December 1996, and the Working Procedures for Appellate Review, WT/AB/WP/3, 28 February 1997.

[20] On the GATT 1947 dispute settlement system and its development, *see* R. Hudec, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (Butterworth, 1993), and E-U Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*, *in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (E-U Petersmann ed., Kluwer Law International, 1997), 3-122.

[21] We note that in the period from 1948 to 1994, there was significant recourse to this system: a total of 250 complaints were brought under the GATT 1947 and the 1979 Tokyo Round Codes and 115 panel reports were rendered. Of these 115 panel reports, 91 reports were rendered under art. XXIII of the GATT 1947, and 24 reports were rendered under the equivalent provision of the Tokyo Round Code. During the same period, the International Court of Justice rendered about 100 judgments and opinions.

[22] D. Steger and S. Hainsworth, *World Trade Organization Dispute Settlement: The First Three Years*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, 1998, 199-226; D. Steger and P. Van den Bossche, *WTO Dispute Settlement: Emerging Practice and Procedure*, PROCEEDINGS OF THE 92ND ANNUAL MEETING ASIL (1998), 79-86; and D. Steger and S. Lester , *WTO Dispute*

In this article we propose to examine the basic and distinctive characteristics of the WTO dispute settlement system. We will discuss seriatim the compulsory jurisdiction of the system, its object and purpose, its political and judicial-type institutions, access to the system, the mandate of panels and the scope of appellate review, panel and Appellate Body proceedings and the implementation and enforcement of recommendations and rulings of the Dispute Settlement Body. Some of the characteristics of the WTO system clearly distinguish it from other forms of international dispute settlement and may have contributed to its apparent success thus far. Other characteristics underscore the need for further development.

THE COMPULSORY JURISDICTION OF THE WTO DISPUTE SETTLEMENT SYSTEM

The WTO dispute settlement system has compulsory jurisdiction over any dispute between WTO Members arising under what is called covered agreements. The covered agreements are the WTO agreements listed in Appendix 1 of the DSU, including the WTO Agreement, the General Agreement on Tariffs and Trade 1994 and all other Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade-related Aspects of Intellectual Property Rights and the DSU.[23] A complaining Member is obliged to bring a dispute arising under any of the covered agreements to the WTO dispute settlement system and a responding Member has, as a matter of law, no choice but to accept the jurisdiction of the WTO dispute settlement system.

Pursuant to Article 23 of the DSU, when a WTO Member seeks redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, it must have recourse to, and must abide by, the rules and procedures of the DSU.[24] Members have to have recourse to the DSU dispute

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Settlement: Emerging Practice and Procedure in Decisions of the Appellate Body, in THE WTO DISPUTE SETTLEMENT SYSTEM, (forthcoming, M. Schütte and K. Reisenfeld eds., Oxford University Press).

[23] According to Appendix 1 of the DSU, Plurilateral Trade Agreements are covered agreements subject to the adoption of a decision by the parties to these agreements setting out the terms for the application of the DSU

[24] DSU, art. 23.1. The only exception to this provision are the special or additional rules and procedures contained in other covered agreements and identified in Appendix 2 of the DSU, *infra*. On the interpretation and application of art. 23 of the DSU, *see* Panel Report,

settlement system to the exclusion, in particular, of any mode of unilateral enforcement of WTO rights and obligations. Members are prohibited from making a determination to the effect that a violation has occurred, that benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of the DSU.[25]

Article 1.1 of the DSU establishes "an integrated dispute settlement system" which applies to all of the covered agreements.[26] The DSU provides for a single, coherent system of rules and procedures for dispute settlement applicable to disputes arising under any of the covered agreements. However, some of the covered agreements provide for a few special and additional rules and procedures "designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement".[27] Pursuant to Article 1.2 of the DSU, these special or additional rules and procedures, which are listed in Appendix 2 of the DSU, prevail over the DSU rules and procedures to the extent that there is a difference between the DSU rules and procedures and the special and additional rules and procedures. As the Appellate Body ruled in *Guatemala - Cement*, "it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special additional provisions are to prevail."[28] A special or additional provision should only be found to prevail over a provision of the DSU "in the case of a conflict between them".[29] The special and additional rules and procedures of a particular covered agreement combine with the generally applicable rules and procedures of the DSU "to form a comprehensive, integrated dispute settlement system for the WTO Agreement."[30]

United States – Sections 301-304 of the Trade Act of 1974 ("*United States – Section 301*"), WT/DS152/R, adopted 27 January 2000.

[25] DSU, art. 23.2 (a). Art. 23.2 also stipulates that to determine the reasonable period of time for implementation (*see infra* pp. 39-40) or to determine the level of suspension of concession or other obligations and to obtain DSB authorization for such suspension (*see infra* pp. 39-40), Members must also follow the rules and procedures set out in the DSU.

[26] Appellate Body Report, Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala – Cement"), WT/DS60/AB/R, adopted 25 November 1998, para. 64.

[27] *Id. at* para. 66.

[28] *Id. at* para. 65.

[29] *Id at* para. 65 and Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/AB/R, adopted 20 August 1999, para. 192.

[30] Appellate Body Report, *Guatemala – Cement*, para. 66.

Just as the complaining Member must bring a dispute arising under any of the covered agreements to the WTO dispute settlement system, so also must the responding Member accept the jurisdiction of the WTO dispute settlement system. The responding Member cannot prevent the establishment of a panel to adjudicate the dispute. As discussed below, the Dispute Settlement Body will establish a panel if requested to do so by the complaining party unless there is a consensus among WTO Members against establishment. Unlike in other international dispute settlement systems, there is no need for the parties to a dispute arising under the covered agreements specially to recognize the jurisdiction of the WTO dispute settlement system to adjudicate that dispute. Accession to membership in the WTO constitutes consent to and acceptance of the compulsory jurisdiction of the WTO dispute settlement system.

It should be noted that the DSU provides in fact for a multitude of dispute settlement procedures. Apart from the procedure which is set out in considerable detail in Articles 4 to 20 of the DSU and which is the procedure primarily discussed below, Article 5 of the DSU provides the possibility for the parties to a dispute if they all agree to do so -- to enter into good offices, conciliation and mediation to settle a dispute.[31] Thus far, there has been no formal recourse to any of these procedures. Furthermore, the DSU, and, in particular, Article 25 thereof, provides for expeditious arbitration within the WTO as an alternative means of dispute settlement.[32] Subject to mutual agreement, parties to a dispute arising under a covered agreement may decide to resort to arbitration, rather than follow the procedure set out in Articles 4 to 20 of the DSU. In that case, the parties must clearly define the issues referred to arbitration and agree on the particular procedure to be followed.[33] The parties must also agree to abide by the arbitration award.[34] By resorting to such arbitration, parties do not, however, put themselves outside the WTO dispute settlement system. The DSU itself explicitly provides for the possibility of resort to arbitration. Furthermore, the arbitration award must be notified to the DSB and the relevant Council or Committee, where the award may be subjected to scrutiny by any WTO Member.[35] The arbitration award must be consistent with the covered

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[31] Pursuant to art. 5.6 of the DSU, the Director-General of the WTO may, acting in an *ex officio* capacity, offer good offices, conciliation or meditation. Thus far, the Director-General has not done so.

[32] DSU, art. 25.1.

[33] *Id.* and DSU, art. 25.2.

[34] DSU, art. 25.3.

[35] Id.

agreements.[36] The provisions of Article 21 of the DSU concerning the surveillance of implementation and Article 22 of the DSU concerning compensation and the suspension of concessions, apply *mutatis mutandis* to arbitration awards under Article 25.[37] During the first five years of operation of the WTO dispute settlement system, no use has been made of Article 25.

THE OBJECT AND PURPOSE OF THE WTO DISPUTE SETTLEMENT SYSTEM

WTO Members consider the dispute settlement system "central" to the overall task of "providing security and predictability to the multilateral trading system."[38] The prompt settlement of disputes arising under the covered agreements "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."[39] The dispute settlement system is designed "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[40] The goal of the dispute settlement system is "to secure a positive solution to a dispute."[41] The DSU thoughtfully provides that the use of the dispute settlement procedures "should not be intended or considered as contentious acts" and that all Members must "engage in these procedures in good faith in an effort to resolve the dispute."[42]

The DSU expresses a clear preference for solutions mutually acceptable to the parties to the dispute, rather than solutions resulting from adjudication.[43] Accordingly, each dispute settlement proceeding must start with consultations by

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[36] DSU, art. 3.5.

[37] DSU, art. 25.4.

[38] DSU, art. 3.2.

[39] DSU, art. 3.3.

[40] DSU, art. 3.2. In *United States – Shirts and Blouses*, the Appellate Body found that, given the explicit aim of dispute settlement that permeates the DSU, it did not consider that art. 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the covered agreements outside the context of resolving a particular dispute (Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, ("*United States* - Shirts *and Blouses*"), at 20).

[41] DSU, art. 3.7.

[42] DSU, art. 3.10. On the role of good faith in such effort, *see* Appellate Body Report, *United States – FSC*, para. 166.

[43] DSU, art. 3.7.

one with the other party with a view to reaching a mutually agreed solution.[44] As noted above, in a number of disputes, it has indeed been possible to reach a solution acceptable to both parties to a dispute.[45] In other disputes recourse to adjudication, however, was necessary in order to secure actual resolution of the dispute. Adjudication will result in recommendations and rulings by a panel, and possibly the Appellate Body. These recommendations and rulings, the DSU states, cannot add to or diminish the rights and obligations provided in the covered agreements. This warning appears in two different provisions of the DSU.[46]

The declared object and purpose of the WTO system is to achieve a satisfactory settlement of the dispute in accordance with the rights and obligations established by the covered agreements.[47] All resolutions of matters formally raised under the consultation and dispute settlement process, including arbitration awards, must be consistent with those agreements and must not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.[48]

ACCESS TO THE WTO DISPUTE SETTLEMENT SYSTEM

Normally a State has recourse to an international dispute settlement system only when it considers that another State has violated its international obligations. A WTO Member may have recourse to the WTO dispute settlement system, however, when it considers that a benefit accruing to it directly or indirectly under a covered agreement is being nullified or impaired or the attainment of any objective of a covered agreement is being impeded. The nullification or impairment of a benefit or the impeding of realization of an objective may, and most often will, be the result of a violation of an obligation prescribed by a covered agreement.[49] In fact, when the complaining Member can demonstrate that the responding Member has violated an obligation under a covered agreement, a prima facie presumption arises that this violation constitutes nullification or impairment of a benefit under that agreement.[50] Such nullification or impairment or the impeding attainment of objectives may, however, also be the

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[44] DSU, art. 4.3.
[45] DSU, art. 3.7.
[46] DSU, art. 3.2 and 19.2.
[47] DSU, art. 3.4.
[48] DSU, art. 3.5.
[49] GATT 1994, art. XXIII:1 (a) and DSU, art. 3.8.
[50] DSU, art 3.8. It is then on the responding Member to rebut this presumption.

result of "the application by another [Member] of any measure, whether or not it conflicts with the provisions" of a covered agreement[51] or of "the existence of any other situation."[52]. Unlike other international dispute settlement systems, the WTO system, therefore, provides for three types of complaints: "violation" complaints, "non-violation" complaints and "situation" complaints. [53] Violation complaints are by far the most common type of complaints. During the first five years of the operation of the WTO system, there have, in fact, been few non-violation complaints and no situation complaints.[54] The difference between the WTO system and other international dispute settlement systems on this point may, therefore, be of little practical significance.

There is no explicit provision in the DSU requiring a Member to have a "legal interest" in order to have recourse to the WTO dispute settlement system. It has been held that such a requirement is not implied either in the DSU or any other provision of the WTO Agreement.[55] Article XXIII:1 of the GATT 1994 and Article 3.7 of the DSU clearly indicate that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU, and that a Member is expected to be largely self-regulating in determining whether any such action would be "fruitful".[56]

Access to the dispute settlement system of the WTO is limited to Members of the WTO.[57] This access is not available, under the WTO Agreement and the other covered agreements as they are currently written, to individuals or

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[51] GATT 1994, art. XXIII:1 (b) and DSU, art. 26.1.

[52] GATT 1994, art. XXIII:1 (c) and DSU, art. 26.2.

[53] Pursuant to art. XXIII.3 of the GATT, situation complaints are not possible in disputes arising under the GATT. Pursuant to art. 64.2 of the TRIPS Agreement non-violation complaints and situation complaints were not possible in disputes arising under the TRIPS Agreement during a period of five years from the date of entry into force of the WTO Agreement. Art. 64.3 provides that the Ministerial Conference can only extend this period by consensus. No such decision has been taken and, therefore, both types of complaint are now possible.

[54] See, e.g., Japan – Measures Affecting Consumer Photographic Film and Paper, complaint by the United States (WT/DS44) and Korea – Measures Afffecting Government Procurement, complaint by the United States (WT/DS163).

[55] Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas ("European Communities – Bananas"), WT/DS27/AB/R, adopted 25 September 1997, paras. 132 and 133.

[56] Appellate Body Report, *European Communities – Bananas*, para. 135.

[57] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products ("United States – Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, para. 101.

international organizations, whether governmental or non-governmental. It is clear from Articles 4, 6, 9 and 10 of the DSU that only Members may become parties to a dispute and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. As the Appellate Body ruled in *United States – Shrimp*, under Articles 10 and 12 and Appendix 3 of 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.[58] Individuals, companies or organizations are not accorded such legal rights. They do not, as such, have direct access to the WTO dispute settlement system.[59]

THE POLITICAL AND JUDICIAL-TYPE INSTITUTIONS OF THE WTO DISPUTE SETTLEMENT SYSTEM

While the WTO has entrusted the adjudication of disputes to independent judicial-type institutions, the ad hoc panels at the first instance level and the standing Appellate Body at the appellate level, the political institutions of the WTO and, in particular, the Dispute Settlement Body, continue to play a vital role in the WTO dispute resolution process. We will briefly discuss the main features of the Dispute Settlement Body, the first instance panels and the Appellate Body.

The Dispute Settlement Body of the WTO

The Dispute Settlement Body of the WTO (the "DSB") is composed of representatives of all the WTO Members and administers the WTO dispute settlement rules and procedures set out in the DSU.[60] The main responsibilities of the DSB are the establishment of the ad hoc panels, the adoption of the reports of the panels and the Appellate Body, the surveillance of implementation of the adopted reports and the authorization of the suspension of concessions or other obligations in case of non-implementation. The DSB meets as often as necessary

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[58] *Id.* A panel is obliged in law to accept and give due consideration only to submissions by parties and third parties to the dispute.

[59] On the authority of panels and the Appellate Body to consider *amicus curiae* briefs, *see infra* note 171.

[60] DSU, art. 2.1. Pursuant to art. III:3 of the WTO Agreement, the General Council of the WTO shall convene as appropriate to discharge the responsibilities of the DSB. The DSB, however, has its own chairman and may establish such rules of procedure as it deems necessary for the fulfillment of its responsibilities.

to carry out its functions within the time frames provided in the DSU.[61] The decisions on the establishment of panels, on the adoption of panel and Appellate Body reports and on the authorization of the suspension of concessions or other obligations in case of non-implementation are adopted by reverse consensus, i.e., these decisions are adopted by the DSB unless the DSB decides by consensus not to adopted them.[62] Since there will usually be at least one Member with a strong interest in the adoption of these decisions, it is highly unlikely that there will ever be a consensus not to adopt these decisions.[63] As a result, decision-making by the DSB on these matters is, for all practical purposes, automatic and a matter of course. A party to the dispute is disabled from blocking the establishment of a panel, the adoption of a panel or Appellate Body report or the suspension of concessions or other obligations in case of non implementation of DSB recommendations and rulings.

WTO Dispute Settlement Panels

At the first instance level, the actual adjudication of disputes brought to the WTO is done by panels. If consultations between the parties to a dispute 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.[64] The request for establishment of a panel must be made 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.[65] If the complaining party so requests, a panel is established, by reverse consensus, at the latest at the DSB meeting following the

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[61] DSU, art. 2.3. The DSB has a regular meeting each month; special meetings may be convened pursuant to footnote 5 to art. 6.1, footnote 7 to art. 16.4 and footnote 11 to art. 21.3 of the DSU.

[62] *See* DSU, arts. 6.1, 16.4, 17.14 and 22.6. Other decisions of the DSB, such as the appointment of the Members of the Appellate Body, are taken by normal consensus. *See* DSU, art. 2.4. Note that the DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision. *See* DSU, art. 2.4, n. 1.

[63] Note, however, that if all parties to a disputes are very dissatisfied with a report, it is possible that the report is not put on the agenda of the DSB for adoption and thus remains unadopted.

[64] DSU, art 4.7. Under certain circumstances set out in arts. 4.3, 4.7 and 4.8 of the DSU, the complaining party may request the establishment of a panel earlier.

[65] DSU, art. 6.2.

meeting at which the request for the establishment first appears as an item on the agenda.[66]

Once a panel is established by the DSB, the parties to the dispute try to reach an agreement on the composition of the panel. In that context, the Secretariat proposes nominations for the panel to the parties.[67] In principle, the parties should not oppose these nominations except for compelling reasons.[68] In practice, the composition of the panel is often a difficult and contentious process. If, however, the parties are unable to agree on the composition of the panel within 20 days of its establishment by the DSB, either party may request the Director-General to determine the composition of the panel.[69] Within ten 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.[70] During the first five years of WTO dispute settlement, the Director-General decided on the composition of a fair number of panels.[71] To assist in the selection of panelists, the Secretariat maintains an indicative list of government and non-government individuals from which panelists may be drawn as appropriate.[72] Parties or the Director-General are free, however, to select panelists whose names do not appear on the Indicative List.

Panels are normally composed of three persons.[73] With regard to the qualifications of panelists, the DSU requires that panels be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on a panel, presented a case to a panel, served as a representative of a Member to the WTO, served in the Secretariat, taught or published on international trade law, or served as a senior trade policy official of a

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[66] DSU, art. 6.1. A panel can be established at the DSB meeting at which the request for the establishment first appeared on the agenda if the responding party does not object to the establishment. This has occurred on a few cases to date.

[67] DSU, art. 8.6.

[68] Id.

[69] DSU, art 8.7.

[70] Id.

[71] Between January 1995 and April 1999, the Director-General decided on the composition of 16 panels.

[72] DSU, art. 8.4. Members periodically suggest names of individuals for inclusion on this list, providing relevant information on their knowledge of international trade and the WTO Agreement. These names shall be added to the list upon approval by the DSB.

[73] DSU, art. 8.5. The parties to the dispute can agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Since 1995, however, parties have not agreed to do so.

Member.[74] Members have agreed that, as a general rule, they will permit their officials to serve as panelists.[75] During the period 1995-1999, most panelists were government trade officials with legal training, many among them Geneva-based trade diplomats. Increasingly, however, law professors and practitioners familiar with international trade law have been appointed to panels. Panelists are to be selected with a view to ensuring their independence, a sufficient diverse background and a wide spectrum of experience.[76] It should be stressed that nationals of Members who are parties to the dispute or third parties may not serve on a panel seised with that dispute, unless the parties agree otherwise.[77] As a result, nationals of a number of smaller Members, such as Switzerland, New Zealand, Norway, the Czech Republic and Hong Kong, China, have frequently been chosen as panelists. Panelists serve in their individual capacities and not as government representatives, nor as representatives of any organization.[78] Members may not give panelists instructions nor seek to influence them as individuals with regard to matters before a panel.[79] Panelists are subject to the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Rules of Conduct").[80] These Rules of Conduct address the need to preserve the integrity and impartiality of panelists and the confidentiality of panel proceedings.[81] Panelists' expenses, including travel and subsistence allowances, are

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[74] DSU, art. 8.1. 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. *See* DSU, art. 8.10.

[75] DSU, art. 8.8.

[76] DSU, art. 8.2.

[77] DSU, art. 8.3. Thus far, the parties to the dispute have never agreed to allow nationals of parties to the dispute to serve on a panel.

[78] DSU, art. 8.9.

[79] Id.

[80] WT/DSB/RC/1, 11 December 1996.

[81] The Rules of Conduct also apply to other persons involved in the panel proceedings, such as the staff of the WTO Secretariat and experts consulted by the panel. Under the Rules of Conduct, prospective panelists must disclose the existence or development of any interest, relationship or matter that is likely to affect, or give rise to justifiable doubts as to his or her independence or impartiality. If a party to the dispute possesses information indicating a breach of the obligations of independence, impartiality or confidentiality on the part of a panelist, or has knowledge of direct or indirect conflicts of interest, it must submit this information promptly to the Chairman of the DSB. If the panelist does not withdraw, the Chairman of the DSB may, after consultations, revoke the appointment of the panelist.

met from the WTO budget.[82] The Secretariat assists panels and provides them with secretarial and technical support.[83]

The Appellate Body

Appeals from the reports of dispute settlement panels are heard by the Appellate Body. Unlike panels, the Appellate Body is a permanent, standing international tribunal.[84] It is composed of seven Members who are appointed by the DSB.[85] The Appellate Body composition is broadly representative of the Membership of the WTO.[86] Each year the Appellate Body Members elect a Chairman from among themselves.[87]

The Members of the Appellate Body serve a term of four years, which can be renewed once.[88] As to the qualifications of Appellate Body Members, the DSU provides that the Appellate Body shall comprise persons of recognized authority,

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[82] DSU, art. 8.11.

[83] DSU, art. 27.1. Art. 27.2 recognizes that there may be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat makes available legal experts to any developing country which so requests. However, the availability of these experts is currently limited to one day a week each and they have to assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

[84] DSU, art. 17.1.

[85] DSU, art. 17.2. Pursuant to art. 2.4 of the DSU, the DSB takes the decision on the appointment of the Appellate Body by consensus.

[86] DSU, art. 17.3. During its first four years (December 1995-December 1999), the composition of the Appellate Body was as follows: James Bacchus (United States), Christopher Beeby (New Zealand), Claus-Dieter Ehlermann (Germany), Said El Naggar (Egypt), Florentino Feliciano (the Philippines), Julio Lacarte-Muró (Uruguay), and Mitsuo Matsushita (Japan).

[87] Working Procedures, Rule 5(1). The Chairman is responsible for the overall direction of the activities of the Appellate Body. His responsibilities comprise, in particular, the supervision of the internal functioning of the Appellate Body, and such other duties as the Members of the Appellate Body may agree to entrust to him or her.

[88] DSU, art. 17.2. In order to stagger the terms of office of the Members of the Appellate Body, three of the original seven Members (Mr. Ehlermann, Mr. Feliciano and Mr. Lacarte) served an initial term of two years. In 1997 these three Members were appointed for a second term, which will expire in December 2001. The first four-year term of the other four original Members expired in December 1999. On 3 November 1999, Mr. Bacchus and Mr. Beeby were re-appointed for a second term. Mr. El-Naggar and Mr. Matsushita did not seek a second term but they agreed to an extension of their first term to 31 March 2000 in order to allow the DSB time to reach a decision on the appointment of two new Members. On 7 April 2000, the DSB appointed Mr. Georges Abi-Saab (Egypt) and Mr. Arumugamangalam Ganesan (India) to serve on the Appellate Body. On 19 March 2000, Mr. Beeby passed away. The DSB has not yet decided on his replacement.

with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.[89] Appellate Body Members must be unaffiliated with any government and must exercise their office without accepting or seeking instructions from any international governmental or non-governmental organization or any private source.[90] During their term of office, Members shall not accept any employment nor pursue any professional activity that is inconsistent with their duties and responsibilities.[91] Like panelists, the Members of the Appellate Body are subject to the Rules of Conduct and are required "to disclose the existence or development of any interest, relationship or matter" that "is likely to affect, or give rise to justifiable doubts" as to, his or her "independence or impartiality".[92] They may not participate in the consideration of any appeal that would create a direct or indirect conflict of interest.[93] Appellate Body Members are not required to reside permanently or continuously in Geneva. They are required, however, to be available at all times and on short notice to hear and decide appeals.[94] The Appellate Body Members convene on a regular basis to discuss matters of policy, practice and procedure.[95] The Appellate Body has its own Secretariat, which provides it with legal and administrative support.[96]

The Appellate Body hears and decides appeals in Divisions of three Members.[97] The Members constituting the Division hearing and deciding a particular appeal are selected on the basis of rotation, while taking into account the principles of random selection and unpredictability and opportunity for all Members to serve regardless their nationality.[98] The Members of a Division select

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[89] DSU, art. 17.3.

[90] *Id.*and Working Procedures, Rule 2(3).

[91] Working Procedures, Rule 2(2).

[92] Rules of Conduct, art. III.1. Annex 2 of the Rules of Conduct contains an illustrative list of information to be disclosed.

[93] A request from a party to the dispute for the disqualification of an Appellate Body Member should be presented to the Appellate Body itself, which decides whether to accept or reject the request (Rule VIII(14)-(17) of the Rules of Conduct and Rule 10(5) of the Working Procedures).

[94] DSU, art. 17.3. To this end, Members keep the Appellate Body Secretariat informed of their whereabouts at all times (Rule 2(4) of the Working Procedures).

[95] Working Procedures, Rule 4.

[96] DSU, art. 17.7. The Appellate Body Secretariat, directed by Ms. Debra Steger, consists of two counsellors, four legal advisors and four secretaries. The Rules of Conduct and the requirements of independence, impartiality and confidentiality also apply to the staff of the Appellate Body Secretariat.

[97] DSU, art. 17.1 and Working Procedures, Rule 6(1).

[98] DSU, art. 17.1 and Working Procedures, Rule 6(2). Unlike panelists, Appellate Body Members who are citizens of the parties to the dispute are not excluded from serving on the Division hearing and deciding the appeal. A member selected in the manner set out in art. 17.1

their Presiding Member.[99] Decisions relating to an appeal are taken by the Division assigned to that appeal. However, to ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of all seven Members, the Division responsible for deciding an appeal exchanges views with the other Members on the issues raised by the appeal.[100] A Division shall make every effort to take its decision on the appeal by consensus. However, if a decision cannot be reached by consensus, the Working Procedures for Appellate Review (the "Working Procedures") provide that the matter at issue shall be decided by a majority vote.[101] To date, all decisions of the Appellate Body have been taken by consensus.[102]

THE MANDATE OF PANELS AND THE SCOPE OF APPELLATE REVIEW

Before discussing the mandate of panels and the scope of appellate review, it should be noted that two important prescriptions are addressed to both panels and the Appellate Body. First, pursuant to the last sentence of Article 3.2 and Article 19.2 of the DSU, a panel or the Appellate Body, in their findings and recommendations, cannot add to or diminish the rights and obligations provided in the covered agreements. Second, pursuant to the second sentence of Article 3.2 of the DSU, panels and the Appellate Body are bound to interpret the provisions of the covered agreements in accordance with customary rules of interpretation of public international law.[103] As the Appellate Body found in United States – 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.[104] Consequently, panels and the Appellate Body commonly

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of the DSU and rule 6(2) of the Working Procedures shall serve on that Division unless he is excused pursuant to the Rules of Conduct, is prevented from serving because of illness or other serious reasons (Rule 6(3) of the Working Procedures referring to Rules 9,10, 12 and 14 thereof). Where a Member is unable to serve on the Division for one of these reasons, he will be replaced by another Member, selected in the same manner (Rule 13 of the Working Procedures).

[99] Working Procedures, Rule 7.

[100] Working Procedures, Rule 4(3). Each Member shall receive all documents filed in an appeal. A Member who has a conflict of interest, shall not take part in the exchange of views.

[101] Working Procedures, Rule 3(2).

[102] The DSU provides that opinions expressed in an Appellate Body report by individual Members shall be anonymous (art. 17.11 of the DSU).

[103] DSU, art. 3.2.

[104] Appellate Body Reports: United States – Standards for Reformulated and Conventional Gasoline ("United States – Gasoline"), WT/DS2/AB/R, adopted 20 May 1996, p.

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.[105] Pursuant to Article 31 of the Vienna Convention, the duty of a treaty interpreter is to examine the words of the treaty to determine the common intentions of the parties.[106] 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.[107] 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."[108]

The Mandate of Panels

The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU.[109] As the Appellate Body stated in Brazil – Dessicated Coconut, the terms of reference of the panel are important for two reasons.[110] First, terms of reference fulfill an important due process objective – they must give parties and third parties sufficient information concerning the claims at stake in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the

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17; and Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 10.

[105] *See*, e.g., Appellate Body Reports: *Japan – Alcoholic Beverages*, p. 11; and *United States – Shrimp*, para. 114.

[106] See, e.g., Appellate Body Reports: India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents"), WT/DS50/AB/R, adopted 16 January 1998, para. 45; and European Communities Customs Classification of Certain Computer Equipment ("European Communities – Computer Equipment"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68£/AB/R, adopted 22 June 1998, para. 84.

[107] Appellate Body Report, United States – Gasoline, p. 23. See, e.g., Appellate Body Reports: Japan – Alcoholic Beverages, p. 12; and Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea – Dairy Safeguards"), WT/DS98/AB/R, adopted 12 January 2000, para. 81.

[108] Appellate Body Report, *India – Patents*, para. 45. *See also* Appellate Body Report, *EC Measures Concerning Meat and Meat Products* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 181.

[109] Appellate Body Report, *India – Patents*, para. 92.

[110] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Dessicated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, at 22.

jurisdiction of the panel by defining the precise claims at issue in the dispute, i.e., the matter before it. A panel may consider only those claims that it has authority to consider under its terms of reference.[111] A panel is bound by its terms of reference.[112] 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.[113]

The document referred to in these standard terms of reference is usually the request for the establishment of a panel.[114] 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.[115] It is, therefore, important that a request for the establishment of a panel be sufficiently precise.[116] Pursuant to Article 6.2 of the DSU, a panel request must "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[117] As the Appellate Body ruled in European Communities – Bananas, Article 6.2 requires that "the claims, but not the arguments, must all be specified

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[111] Appellate Body Report, *India – Patents*, para. 92. A panel cannot assume jurisdiction that it does not have (*Id.*).

[112] Appellate Body Report, *India – Patents*, para. 93.

[113] DSU, art. 7.1. In case the complaining party requests the establishment of a panel with other than standard terms of reference, the request of the establishment of the panel shall include the proposed text of the special terms of reference. *See* DSU, art. 6.2. 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. *See also* DSU, art. 7.3.

[114] Note that the request for consultations may also be referred to.

[115] If the panel has special terms of reference, a claim will not fall within the terms of reference of the panel unless that claim is contained in these special terms of reference or identified in the documents referred to in these special terms of reference.

[116] Appellate Body Report, *European Communities – Bananas*, para. 142. The request for the establishment of a panel must also be sufficiently precise because it informs the defending party and the third parties of the legal basis of the complaint.

[117] In *India – Patents*, the Appellate Body ruled that the convenient phrase, "including but not necessarily limited to", is simply not adequate to "identify the specific measures at issue" and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" (Appellate Body Report, *India – Patents*, para. 90).

sufficiently in the request for the establishment of a panel".[118] With regard to the requirement that the request must "identify the specific measures at issue", the Appellate Body ruled in European Communities – Computer Equipment, that "measures" within the meaning of Article 6.2 are not only normative rules or measures of general application, but also can be, for example, the application of tariffs by customs authorities.[119] In the same case, the Appellate Body found that although Article 6.2 does not require that the products to which the "specific measures at issue" apply be identified, with respect to certain WTO obligations, in order adequately to identify "the specific measures at issue" it may also be necessary to identify the products subject to the measures in dispute.[120] Whether the "specific measures at issue" are sufficiently identified as required by Article 6.2 relates to the ability of the responding party to defend itself given the actual reference to the measure complained about.[121] 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", we note that Article 6.2 demands only a brief summary of the legal basis of the complaint which summary must, however, be one "sufficient to present the problem clearly".[122] In European Communities – Bananas, 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 Article 6.2 of the DSU.[123] Whether the mere listing of the articles claimed to have been violated actually meets the standard of Article 6.2 must, however, be examined on a case-by-case basis. In Korea – Dairy Safeguards, the Appellate Body stated that in resolving that question, one must take into account "whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."[124]

In the language of Article 11 of the DSU, the function of panels is to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the

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[118] Appellate Body Report, *European Communities – Bananas*, para. 143. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceedings.

[119] Appellate Body Report, European Communities – Computer Equipment, para. 65.

[120] Appellate Body Report, European Communities – Computer Equipment, para. 67.

[121] Appellate Body Report, European Communities – Computer Equipment, para. 70.

[122] Appellate Body Report, *Korea – Dairy Safeguards*, para. 120.

[123] Appellate Body Report, *European Communities – Bananas*, para. 141.

[124] Appellate Body Report, *Korea – Dairy Safeguards*, para. 127.

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 European Communities – 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."[125] So 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 European Communities – Hormones, the Appellate Body addressed for the first time 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 characterized as a failure to make an objective assessment of the facts."[126] The Appellate Body stated:

> 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 willful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.[127]

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[125] Appellate Body Report, *European Communities – Hormones*, para. 116. We observe, however, that there is one covered agreement, the *Anti-dumping Agreement*, which sets out in art. 17.6 thereof, a special standard of review for disputes arising under that agreement.

[126] Appellate Body Report, *European Communities – Hormones*, para. 133.

[127] *Ibid.* Furthermore, 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

An allegation that a panel has failed to conduct the 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."[128] So far, no claim that a panel violated its obligation under Article11 of the DSU has been successful.

If 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.[129] In addition to making recommendations, the panel may suggest ways in which the Member concerned could implement those recommendations.[130] These suggestions are not legally binding on the Member concerned but because the panel making the suggestions might later be called upon to assess sufficiency of the implementation of the recommendations, such suggestions are likely to have a certain impact.[131] Thus far, a few panels have made use of this authority to make suggestions regarding implementation of their recommendations.[132]

Panels are not required to examine each and every one of the legal claims that a complaining party might be minded to make. Since the aim of dispute settlement to secure a positive solution to a dispute, panels "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[133] A panel has discretion to determine the claims it must address in order actually and effectively to resolve the dispute between the parties.[134] Panels are, however, cautioned 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. 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

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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."

[128] Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* ("*European Communities – Poultry*"), WT/DS69/AB/R, adopted 23 July 1998, para. 133.

[129] DSU, art. 19.1.

[130] Id.

[131] Infra, p. 41.

[132] See, e.g., Panel Report, United States - Underwear, Panel Report, Guatemala - Cement, 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 ("United States – Hot-Rolled Steel"), WT/DS138/R.

[133] Appellate Body Report, *United States – Shirts and Blouses*, at 19.

[134] Appellate Body Report, *India - Patents*, para. 87.

prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members '."[135]

Scope of Appellate Review

Only parties to the dispute may appeal a panel report.[136] Third parties or other WTO Members cannot appeal a panel report. However, WTO Members which have notified their interest to the DSB under Article 10.2 of the DSU, can participate in the appellate review proceedings as third participants, and make written submissions to the Appellate Body and appear at the oral hearing.[137]

An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.[138] Factual findings and conclusions of the panel are, in principle, non-appealable. In order to determine the scope of its mandate, it is therefore necessary for the Appellate Body to distinguish between questions of law and questions of fact. In practice, the distinction is not always readily discernible. This problem is, of course, not uncommon and many national appellate courts with jurisdiction limited to questions of law have confronted it. In European Communities – Hormones, the Appellate Body found:

> The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not the Codex [Alimentarius] has adopted an international standard, guideline or recommendation on MGA is a factual question. Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.[139]

Whereas the Panel's examination and weighing of the evidence submitted are, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review, the panel's discretion

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[135] 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"), WT/DS76/AB/R, adopted 19 March 1999, para. 111.

[136] DSU, art. 17.4.

[137] *Id.* and Working Procedures, Rules 24 and 27(3).

[138] DSU, art. 17.6.

[139] Appellate Body Report, *European Communities – Hormones*, para.132.

as trier of facts is not unlimited. The panel's discretion "is always subject to, and is circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it."[140] Whether the Panel has made such an objective assessment is itself a legal question.[141]

The legal findings and conclusions of the panel subject to appeal may be upheld, modified or reversed by the Appellate Body.[142] The Appellate Body cannot, however, remand a dispute to the panel for further additional fact-finding or for the examination of legal issues not addressed by the panel. This lack of remand power is considered by some to be a major shortcoming of the current dispute settlement system. It should be noted, however, that in a number of cases the Appellate Body has examined legal issues which the panel had not addressed. The Appellate Body considered it to be within its competence to examine and decide these issues in order to complete the legal analysis and thus effectively resolve the dispute between the parties.[143] The Appellate Body has stressed, however, that it is possible to complete the legal analysis only where there are sufficient factual findings by the panel or undisputed facts in the panel record.[144]

PANEL AND APPELLATE BODY PROCEEDINGS

One of the most striking features of the WTO dispute settlement system is the short time-frames within which the proceedings of both panels and the Appellate Body must be completed. The period in which a panel shall conduct its examination, from the date that the composition and terms of reference of the panel have 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.[145] When a panel considers that it cannot issue its report within six months, it shall inform the DSB

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[140] Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, para.162.

[141] *Supra*, note 21, para. 132.

[142] DSU, art. 17.13.

[143] Appellate Body Report, *Australia – Salmon*, para. 117. The legal analysis was completed in the following Appellate Body Reports: *United States – Gasoline*; *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R, adopted 30 July 1997; *European Communities – Poultry*; *United States – Shrimp*; and *Australia – Salmon*.

[144] Appellate Body Report, *Australia – Salmon*, paras. 241, 242 and 255.

[145] DSU, art. 12.8. 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 (arts. 12.9 and 4.9 of the DSU).

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.[146] With regard to the Appellate Body proceedings, the DSU provides that, as a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report.[147] When the Appellate Body believes that it cannot render its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. No other international court or tribunal operates under such severe time limits. These time limits, and in particular the time limits for the Appellate Body, have been criticized as excessively short and demanding for both the parties to the dispute and the Appellate Body. As a result of these time limits, however, there is no backlog of cases either at the panel or appellate level. While panels frequently go beyond the time limits imposed on them by the DSU, the Appellate Body has thus far been able to complete all but one appeal within the maximum period of 90 days.[148]

Panel Proceedings

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. Since the Working Procedures contained in Appendix 3 are quite rudimentary, many panels have been obliged to adopt ad hoc procedures, which often differ from case to case and, therefore may leave an impression with the parties of procedural uncertainty. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.[149] The Appellate Body has repeatedly observed, however, that detailed, standard working procedures for

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[146] DSU, art. 12.9.

[147] DSU, art. 17.5. In cases of urgency, including those which concern perishable foods, the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible (arts. 17.5 and 4.9 of the DSU).

[148] For panel reports circulated to WTO Members in the period from 1 January 1995 to 31 August 1998, the median time-period from the establishment of the panel to the circulation of the panel report was 10 months. The time-period ranged from 7 ½ months to 17 ½ months. In *European Communities – Hormones*, the Appellate Body went beyond the 90-day time-limit for appellate review proceedings.

[149] DSU, art. 12.2.

panels, including rules on preliminary rulings, fact-finding and the submission of evidence, would help to ensure due process and fairness in panel proceedings.[150]

After consulting the parties to the dispute at what is called the organizational meeting, the panel, as soon as practicable, fixes the timetable for the panel process, indicating *inter alia* precise deadlines for written submissions, and adopts, where necessary, ad hoc working procedures.[151] The complaining party makes its first submission in advance of the responding party's first submission unless the panel decides, after consultation with the parties, that the parties should submit their first submissions simultaneously. In their first written submissions, the parties present the facts of the case and their arguments. The rebuttal submissions, in which each party replies to the arguments and evidence submitted by the other parties, are submitted simultaneously.[152] Written submissions to the panel are treated as confidential and are not made available to the public.[153] 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.[154]

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[150] Appellate Body Reports: European Communities – Bananas, para. 144; India – Patents, para. 95; and Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ("Argentina – Textiles and Apparel"), WT/DS56/AB/R, adopted 22 April 1998, para. 79 and footnote 68.

[151] DSU, art. 12.3 and 12.5. Paragraph 12 of Appendix 3 to the DSU contains a proposed timetable for panel work. In determining the timetable for the panel process, the panel must provide sufficient time for the parties to the dispute to prepare their submissions (art. 12.4 of the DSU).

[152] DSU, art. 12.6. 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 to the dispute.

[153] DSU, art. 18.2. However, nothing in the DSU precludes a party to a dispute from disclosing statements of its own positions to the public. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public (art. 18.2 and paragraph 3 of Appendix 3 of the DSU). *See also* DSU, app. 3, para. 10.

[154] Panel Reports: Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft"), WT/DS70/R, adopted 20 August 1999, Annex 1; and Brazil – Export Financing Programme for Aircraft ("Brazil – Aircraft"), WT/DS46/R, adopted 20 August 1999, Annex 1. These procedures concerned, inter alia, the storage of and access to business confidential information as well as the return and destruction of such information.

The panel meets in closed session.[155] After the filing of the first written submissions of the parties, the panel holds its first substantive meeting with the parties.[156] At this meeting, the panel asks the complaining party to present its case. At the same meeting, the respondent party is asked to present its own point of view.[157] 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.[158] Third parties are invited to present their views during a session of the first substantive meeting of the panel set aside for that purpose.[159] After the filing of the rebuttal submissions, the panel holds a second substantive meeting with the parties. At this meeting the respondent party is given the right to take the floor first, to be followed by the complaining party.[160] 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.[161] No *ex parte* communications with the panel are allowed concerning matters under consideration by it.[162] The meetings of the panel with the parties are open only to WTO Members which are a party to the dispute. Panel meetings are not open to the general public.

The DSU does not explicitly address the issue of representation of the parties before panels. In *European Communities - Bananas*, the issue arose whether private counsel, not employed by government, may represent a party before panels. In a brief and matter of fact 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 panel proceedings. A party can, therefore, decide that private counsel forms part of its delegation and

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[155] DSU, app. 3, para. 2.

[156] DSU, app. 3, para. 4.

[157] DSU, app. 3, Para. 5.

[158] DSU, art. 10. Third parties shall receive the submissions of the parties to the dispute to the first meeting with the panel.

[159] DSU, app. 3, para. 6. In several cases, panels have given third parties more extended rights of participation in the panel proceedings. In *European Communities – Bananas*, the Panel granted the third parties the right to attend both the first and second substantive meeting of the panel with the parties.

[160] DSU, app. 3, para. 7. Additional meetings with the parties may be scheduled if required (Paragraph 12 of Appendix 3 of the DSU). In practice, however, very few panels have had additional meetings with the parties.

[161] DSU, app. 3, para. 8. During panel proceedings parties may also question each other.

[162] DSU, art. 18.1.

will represent it before the panel. In practice, private counsel now routinely appear in panel proceedings as well as in Appellate Body hearings.

In recognition of the fact that disputes brought to panels for adjudication often involve factual, technical and scientific issues, Article 13.1 of the DSU gives panels "the right to seek information and technical advice from any individual or body which it deems appropriate".[163] Panels may "consult experts to obtain their opinion on certain aspects of the matter" under consideration.[164] As the Appellate Body ruled *in Argentina - Textiles and Apparel*, "this is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision."[165] The panel's authority to seek information and technical advice is "comprehensive" and "embraces more than merely the choice and evaluation of the source of the information or advice which it may seek."[166] It includes the "authority to decide not to seek such information or advice at all."[167] In *United States - Shrimp*, the Appellate Body further stated:

> (A) panel also has the authority to accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof. It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and 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.[168]

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

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[163] Pursuant to art. 13.1 of the DSU, "before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." Art. 11.2 of the *SPS Agreement* also provides for the right of a panel to seek the advice of experts.

[164] DSU, art. 13.2. With respect to a factual issue concerning a scientific or other technical matter raised by a party to the dispute, a panel may request an advisory report in writing from an expert review group. Rues for the establishment of such a group and its procedures are set forth in Appendix 4 of the DSU. Thus far, panels have not made use of the possibility to request an advisory report from an expert review group. Panels have preferred to consult experts on an individual basis. The DSU leaves to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate (Appellate Body Report, *European Communities – Hormones*, para. 147).

[165] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84.

[166] Appellate Body Report, *United States - Shrimp*, para. 104.

[167] Id.

[168] Id.

matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...."[169] Panels thus have significant authority to ascertain facts relating to the dispute. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses to help the panel to understand and evaluate the evidence submitted and the arguments made by the parties, but not, however, to make the case for one or the other party. [170] During the period 1995-1999, panels have consulted experts in, for example, *European Communities – Hormones*, *Australia – Salmon* and *Japan – Agricultural Products*, all disputes involving sanitary or phytosanitary measures which required an understanding of complex scientific issues.

With regard to the issue whether panels may consider unsolicited *amicus curiae* briefs, the Appellate Body noted in *United States - Shrimp* 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.[171] According to the Appellate Body, "the thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."[172] That authority, and the scope thereof, is "indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...'."[173] The Appellate Body came to the conclusion that panels have "the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not."[174]

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[169] *Id.*, at para. 106.

[170] Appellate Body Report, *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products*"), WT/DS76/AB/R, adopted 19 March 1999, para. 129

[171] Appellate Body Report, *United States – Shrimp*, para. 105.

[172] *Id.*, at para. 106.

[173] *Id.* The Appellate Body reversed the Panel's reasoning that the authority to seek information under art. 13 of the DSU implied a *prohibition* on accepting information which has been submitted without having been requested by a panel (Appellate Body Report, *United States – Shrimp*, para. 108).

[174] Appellate Body Report, *United States – Shrimp*, para. 108. Furthermore, the amplitude of the authority vested in panels to shape the process of fact-finding and legal interpretation

The DSU does not establish precise deadlines for the presentation of evidence by a party to the dispute. The DSU contemplates two distinguishable stages in a panel proceeding: a first stage during which the complaining party should set out its case in chief, 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.[175] However, in the absence of hard and fast DSU rules on deadlines for submitting evidence and in the absence of specific deadlines in ad hoc working procedures, a panel has discretion to admit or refuse evidence submitted late in the panel proceeding. The panel must of course be careful constantly to observe due process, which, *inter alia*, entails providing the parties adequate opportunity to respond to the evidence submitted.[176]

The DSU does not contain any specific rules concerning the burden of proof in panel proceedings. However, in United States – 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.[177]

These rules on the burden of proof also apply in panel proceedings. The Appellate Body further added that "precisely how much and precisely what kind of evidence will be required to establish a presumption that what is claimed is

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makes clear that a panel will not be "deluged" with non-requested materials, unless that panel allows itself to be so "deluged"

[175] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.

[176] Appellate Body Reports: *Argentina – Textiles and Apparel*, paras. 80-81; and *Australia – Salmon*, para. 272.

[177] Appellate Body Report, *United States – Shirts and Blouses*, at 14.

true, will necessarily vary from measure to measure, provision to provision, and case to case."[178]

As with a court or tribunal, the panel deliberations are confidential.[179] The reports of panels are drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.[180] Opinions expressed in the panel report by individual panelists must be anonymous.[181] Thus far, there has been only one panel report setting out an anonymous "dissenting opinion".[182]

Having completed a draft of the descriptive (i.e., facts and argument) sections of its report, the panel issues this draft to the parties for their comments.[183] Following the expiration of the time period for comments, the panel subsequently issues an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions.[184] 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.[185] The findings of the final panel report commonly include a discussion of the arguments made at the interim review stage.[186] The need for and utility of this interim review procedure has been the subject of debate. The final panel report is first issued to the parties to the dispute and some time later, once the report is available in the three working languages of the WTO, circulated to the general WTO Membership.[187] Once circulated to WTO Members, the panel report is an unrestricted document available to the public. Within 60 days after the date of circulation of the panel report to the

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[178] Ibid.

[179] DSU, art. 14.1.

[180] DSU, art. 14.2.

[181] DSU, art. 14.3.

[182] Panel Report, European Communities – Poultry.

[183] DSU, art. 15.1. We note that recently some panels have attached the submissions, the written versions of oral statements and answers to questions to their report, rather than summarizing these documents in the descriptive sections of the report. *See, e.g*, Panel Report, *United States – Leaded Bars*.

[184] DSU, art. 15.2.

[185] Id.

[186] DSU, art. 15.3. If no comments are received from any party within the comment period , the interim report shall be considered the final panel report (art.. 15.3 of the DSU).

[187] 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 1995-2000, however, English was the language commonly used by the panel, the parties and third parties in panel proceedings.

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.[188]

It should be noted that, 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.[189] If the work of the panel has been suspended for more than 12 months, the authority of the panel lapses.[190]

Appellate Body Proceedings

The Appellate Body has detailed standard working procedures set out in the Working Procedures for Appellate Review (the "Working Procedures").[191] Pursuant to Article 17.9 of the DSU, these Working Procedures were drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General. In addition, where a procedural question arises that is not covered by the Working Procedures, the Division hearing the appeal may, in the interest of fairness and orderly procedure in the conduct of the appeal, adopt an appropriate procedure for the purpose of that appeal. [192]

Pursuant to Rule 20(1) of the Working Procedures, an appellate review process commences with a party's notification in writing to the DSB of its decision to appeal and the simultaneous filing of a notice of appeal with the Appellate Body. The notice of appeal must adequately identify the findings or legal interpretations of the panel which are being appealed as erroneous.[193] A party can

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[188] DSU, art. 16.4. 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 (art. 16.1 of the DSU). The parties to a dispute have the right to participate fully in the consideration of panel reports by the DSB, and their views shall be fully recorded (art. 16.3 of the DSU).

[189] DSU, art. 12.12.

[190] See, e.g., United States – The Cuban Liberty and Democratic Solidarity Act, complaint by the European Communities, WT/DS38, and European Communities – Measures Affecting Butter Products, complaint by New Zealand, WT/DS72.

[191] Working Procedures for Appellate Review, WT/AB/WP/3, dated 28 February 1997. This is a consolidated, revised version of the Working Procedures *for Appellate Review*, WT/AB/WP/1, dated 15 February 1996.

[192] Working Procedures, Rule 16(1). Such procedure must, however, be consistent with the DSU, the other covered agreements and the Working Procedures.

[193] Pursuant to Rule 20(2)(d) of the Working Procedures, the notice of appeal must include "a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel." The notice of appeal is not expected to

appeal a panel report as soon as the report is circulated to WTO Members and it can do so as long as the report has not yet been adopted by the DSB. In actual practice, parties usually appeal shortly before the meeting of the DSB that is to consider the adoption of the report.

Upon the commencement of an appeal, the Appellate Body Division responsible for deciding the appeal draws up an appropriate working schedule in accordance with the time periods stipulated in the Working Procedures.[194] In exceptional circumstances, where strict adherence to such a time-period would result in manifest unfairness, a party or third party to the dispute may request modification of such time period.[195] Within 10 days after filing of the notice of appeal, the appellant must file a written submission.[196] The written submission sets out a precise statement of the grounds of appeal, including the specific allegations of legal errors in the panel report, and the legal arguments in support of these allegations.[197] Within 15 days after the filing of the notice of appeal, other parties to the dispute may, by filing an appellant's submission, join in the original appeal or appeal on the basis of other alleged legal errors in the panel report.[198] Within 25

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contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission. *See* Appellate Body Reports: *United States – Shrimp*, paras. 92-97; and *European Communities – Bananas*, paras. 148-152.

[194] Working Procedures, Rule 26(1). The Appellate Body Secretariat shall serve forthwith a copy of the working schedule on the appellant, the parties to the dispute and any third parties (Rule 26(4) of the Working Procedures). The working schedule sets forth precise dates for the filing of documents and includes a timetable of the Division's work (Rule 26(2) of the Working Procedures). In appeals of urgency, including those which concern perishable goods, the Appellate Body shall make every effort to accelerate the appellate proceedings to the greatest extent possible (Rule 26(3) of the Working Procedures). Where possible, the working schedule will include the date for the oral hearing. Where a participant fails to file a submission within the required time periods, the Division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate (Rule 29 of the Working Procedures).

[195] Working Procedures, Rule 16(2).

[196] Working Procedures, Rule 21(1). Pursuant to Rule 31 and the Timetable for Prohibited Subsidies Appeals set out in Annex I of the Working Procedures, the appellant's submission in proceedings involving prohibited subsidies shall be filed within 5 days after the date of the filing of the notice of appeal.

[197] Working Procedures, Rule 21(2). The submission also includes a precise statement of the provisions of the covered agreements and other legal sources relied on, as well as the nature of the decision or ruling sought.

[198] Working Procedures, Rule 23(1). Any written submission by such other appellants is subject to the same format requirements as the submission of the original appellant (Rule 23(2) of the Working Procedures). Pursuant to Rule 23(4) of the Working Procedures, parties may

days after the filing of the notice of appeal, any party that wishes to respond to allegations of legal errors, whether raised in the submission of the original appellant or in the submission(s) of other appellants, may file an appellee's submission.[199] The appellee's submission shall set out a precise statement of the grounds for opposing the specific allegations of legal errors raised in the appellant's submission, and include legal arguments in support thereof. Within 25 days after the date of the filing of the notice of appeal, any third party may file a written submission stating its intention to participate as a third participant in the appeal and presenting legal arguments in support of its position.[200]

The Division responsible for deciding the appeal holds an oral hearing. As a general rule, the oral hearing is held 30 days after the filing of the notice of appeal.[201] However, for practical and organizational reasons, the hearing is often held at a somewhat later date. The purpose of the oral hearing is to provide participants with an opportunity to present and argue their case before the Division, in order to clarify and distill the legal issues in the appeal. At the hearing, the appellant(s) and appellee(s) first make brief oral arguments focusing

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also, however, exercise their own right of appeal pursuant to art. 16.4 of the DSU. In such case a single Division shall examine the appeals (Rule 23(5) of the Working Procedures). In all appellate review proceedings to date, other parties have preferred to submit another appellant's submission within 15 days after the notice of appeal of the original appellant rather than exercising their own right of appeal. Pursuant to Rule 31 and the Timetable for Prohibited Subsidies Appeals set out in Annex I of the Working Procedures, the other appellant(s) submission(s) in proceedings involving prohibited subsidies shall be filed within 7 days after the date of the filing of the notice of appeal.

[199] Working Procedures, Rules 22(1) and Rule 23(3). Pursuant to Rule 31 and the Timetable for Prohibited Subsidies Appeals set out in Annex I of the Working Procedures, the appellee(s) submission(s) in proceedings involving prohibited subsidies shall be filed within 12 days after the date of the filing of the notice of appeal.

[200] Working Procedures, Rule 24. Pursuant to Rule 31 and the Timetable for Prohibited Subsidies Appeals set out in Annex I of the Working Procedures, the third participant(s) submission(s) in proceedings involving prohibited subsidies shall be filed within 12 days after the date of the filing of the notice of appeal.

[201] Working Procedures, Rule 27(1). Where possible in the working schedule (*see infra*), or at the earliest possible date, the Appellate Body Secretariat shall notify all parties to the dispute, participants, third parties and third participants of the date for the oral hearing (Rule 27(2)). In exceptional circumstances, where strict adherence to a time period set out in the Working Procedures would result in manifest unfairness, a party to the dispute, participant, a third party or a third participant may request that a Division modify the date set out in the working schedule for the oral hearing (Rule 16(2)). Pursuant to Rule 31 and the Timetable for Prohibited Subsidies Appeals set out in Annex I of the Working Procedures, the oral hearing in proceedings involving prohibited subsidies shall be held an approximate 15 days after the date of the filing of the notice of appeal.

upon the core legal issues raised in the appeal. Any third participant may also make oral arguments.[202] The Presiding Member may, as necessary, set time limits for oral arguments.[203] As a rule, the appellant and appellee are given 30 minutes and the third participants 15 minutes each for their oral arguments. After the oral presentations, the participants (and the third participants) answer detailed questions posed by the Division regarding the issues raised in the appeal. At the end of the oral hearing, the participants and the third participants, are given the opportunity to make a brief concluding statement. In oral hearings, participants and third participants are entitled to be represented by counsel of their own choice; they may, therefore, be represented by private lawyers rather than, or in addition to, government officials if they so wish.[204] The oral hearing is usually completed in one day. In complex cases, however, the oral hearing may take longer. In European Communities – Bananas and European Communities – Hormones, for example, the oral hearing took two and a half days and two days, respectively.

At any time during the appellate proceedings, the Division may address questions to, or request additional memoranda from, any participant or third participant, and specify the time periods by which written responses or memoranda shall be received.[205] Any such questions, responses or memoranda are simultaneously made available to the other participants and third participants in the appeal, who are given an opportunity to respond.[206] Throughout the proceedings, the participants and third participants are precluded from having ex parte communications with the Appellate Body in respect of matters concerning the appeal. Neither a Division nor any of its Members may meet with, or contact, one participant or third participant in the absence of the other participants and third participants.[207]

As noted above, the Division responsible for deciding an appeal will exchange views on issues raised by the appeal with the other Members of the Appellate Body before finalizing its report. When finalized, the report is signed by

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[202] Working Procedures, Rule 27(3).

[203] Working Procedures, Rule 27(4).

[204] Appellate Body Report, *European Communities – Bananas*, paras. 10-12.

[205] Working Procedures, Rule 28(1).

[206] Working Procedures, Rule 28(2).

[207] Working Procedures, Rule 19(1). No Member of the Division may discuss any aspect of the subject matter of an appeal with any participant or third participant in the absence of the other Members of the Division (Rule 19(2)). A Member of the Appellate Body who is not assigned to the Division hearing the appeal shall not discuss any aspect of the subject matter of the appeal with any participant or third participant (Rule 19(3)).

the three Members of the Division. The report is then translated so that it is available in all three languages of the WTO.[208] After translation, the report is circulated to the WTO Members and is an unrestricted document, available to the public, as from that moment. Appellate Body reports shall, in no case, be circulated later than 90 days after the filing of the notice of appeal.[209] It is noteworthy that this 90-day period includes the time devoted to translation of the original version into the two other official languages of the WTO.

The proceedings of the Appellate Body are confidential.[210] Therefore any written submission, legal memoranda, written responses to questions, and oral statements by the participants and the third participants; the conduct of the oral hearing before the Appellate Body, including any transcripts or tapes of that hearing; and the deliberations, the exchange of views and internal workings of the Appellate Body are confidential. [211] Furthermore, Members of the Appellate Body and its staff are covered by Article VII:1 of the Rules of Conduct, which provide that they shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential.[212]

Within 30 days following circulation, the Appellate Body report and the panel report as upheld, modified or reversed by the Appellate Body, are adopted

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[208] During the period 1995-1999, in all appellate review proceedings English has been the working language of the Appellate Body and the Appellate Body reports were all drafted in English and then translated into French and Spanish. In a few appellate review proceedings, participants or third participants filed submissions or made oral statements in French and Spanish. When requested, interpretation is provided at the oral hearing.

[209] DSU, art. 17.5. At any time during the appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB (Rule 30(1) of the Working Procedures). Where the parties to a dispute reach a mutually agreed solution during the appellate review process, which is the subject of an appeal that has been notified to the DSB pursuant to art. 3.6 of the DSU, it too shall be notified to the Appellate Body (Rule 30(2)).

[210] DSU, art. 17.10. *See also* art. 18.2 of the DSU concerning the confidentiality of written submissions and information submitted to the Appellate Body.

[211] Appellate Body Reports in *Canada – Aircraft*, para. 143 and *Brazil – Aircraft*, para. 121.

[212] *Id.* We note that for these reasons, the Appellate Body did not consider it necessary in *Canada – Aircraft* and *Brazil Aircraft*, under all the circumstances of these cases, to adopt *additional* procedures for the protection of business confidential information in the appellate proceedings, and declined the request of Canada and Brazil for such additional procedures. *See* the Appellate Body Reports in *Canada – Aircraft*, paras. 141-147 and *Brazil – Aircraft*, paras. 119-125.

by the DSB, unless the DSB decides by consensus not to adopt the reports.[213] The adopted Appellate Body report is accepted unconditionally by the parties to the dispute. The adoption procedure is, however, without prejudice to the right of Members to express their views on an Appellate Body report and parties to the dispute commonly avail themselves of this right.[214]

WTO Members have made extensive use of the possibility to appeal panel reports. Of the 33 panel reports circulated to WTO Members during the period 1995 – 1999, 27 were appealed.[215] During this period, the caseload of the Appellate Body has also steadily increased. In 1996, four appeals were filed, in 1997, five, in 1998, eight and in 1999, nine.

IMPLEMENTATION AND ENFORCEMENT OF RECOMMENDATIONS AND RULINGS

Where a panel or the Appellate Body rules that a measure is inconsistent with a covered agreement, it recommends that the Member concerned bring the measure into conformity with that agreement.[216] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.[217] The panel and Appellate Body reports, and the rulings and recommendations contained therein,

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[213] DSU, art. 17.14. In accordance with art. 4.9 of the SCM Agreement, Appellate Body reports concerning prohibited subsidies shall be adopted by the DSB unless the DSB decides by consensus not to adopt the report within 20 days following its issuance to the Members.

[214] DSU, art. 17.14.

[215] The following panel reports were not appealed: Japan – Measures Affecting Consumer Photographic Film and Paper ("Japan – Film"),WT/DS44/R, adopted 22 April 1998; India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents (EC)), WT/DS79/R, adopted 22 September 1998, complaint by the European Communities; Indonesia – Certain Measures Affecting the Automotive Industry ("Indonesia – Automobile Industry"), WT/DS54/15, WT/DS59/13, WTDS64/12, adopted 7 December 1998; United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors /DRAMS) of One Megabit or Above from Korea ("United States – DRAMS"), WT/DS99/R, adopted 19 March 1999; Australia – Subsidies Provided to Producers and Exporters of Automotive Leather ("Australia – Automotive Leather"), WT/DS126/R, adopted 16 June 1999; and United States – Section 301.

[216] DSU, art. 19.1. However, if, in cases involving a "non-violation" complaint, a measure is found to nullify or impair benefits under, or impede the attainment of objectives of, a covered agreement without violation thereof, there is no obligation to withdraw the measure. In such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment. *See* DSU, art. 26.1. With regard to cases involving a "situation" complaint, *See* DSU, art. 26.2.

[217] DSU, art. 19.1. *See*, e.g., Panel Report, *United States – Leaded Bars*, para. 8.2.

become binding on the parties to the dispute after they have been adopted by the DSB, but not on Members that are not a party to the dispute. There is no *stare decisis* or binding precedent rule in the WTO dispute settlement system. However, in Japan – Alcoholic Beverages, the Appellate Body found with regard to adopted GATT 1947 panel reports that these reports "are an important part of the GATT acquis" and that "they are often considered by subsequent panels".[218] According to the Appellate Body, adopted GATT 1947 panel reports "create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute."[219] Similarly, adopted WTO panel reports and Appellate Body reports are taken into account where they are relevant to subsequent disputes.

Prompt compliance with recommendations or rulings adopted by the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.[220] At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned must inform the DSB of its intentions in respect of implementation of those recommendations and rulings.[221] If it is impracticable to comply immediately with the recommendations and rulings, and this may often be the case, the Member concerned has a reasonable period of time in which to do so. The reasonable period of time is defined as the period of time proposed by the Member concerned and approved by the DSB, or in the absence of such approval, the period of time mutually agreed by the parties to the dispute within 45 days after the adoption of the recommendations and rulings.[222] If the parties are unable to agree on a reasonable period of time for implementation, the applicable period of time may be, at the request of either party, determined through binding arbitration within 90 days after adoption of the recommendations and rulings.[223] If the parties do not agree on an arbitrator within 10 days after referring the matter to arbitration, the arbitrator is appointed by the Director-General within 10 days, after consulting

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[218] Appellate Body Report, *Japan – Alcoholic Beverages*, at 14.

[219] *Id.* at 14-15. Furthermore, unadopted reports, on the contrary, "'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the Contracting Parties to the GATT or WTO Members'." Nevertheless, a panel could find "useful guidance in the reasoning of an unadopted panel report that it considers to be relevant."

[220] DSU, art. 21.1.

[221] DSU, art. 21.3.

[222] DSU, art. 21.3 (a) and (b). Parties to the dispute have mutually agreed on the reasonable period of time for implementation in, for example, *Canada –Periodicals* (15 months), *India – Patents* (15 months), *United States – Shrimp* (13 months), *Japan – Agricultural Products* (9 months and 12 days) and *United States – DRAMS* (8 months).

[223] DSU, art. 21.3 (c).

the parties.[224] During the period 1995-1999, the reasonable period of time was fixed by an arbitrator in 6 cases.[225] In all these cases, the arbitrator, chosen by mutual agreement of the parties or appointed by the Director-General, was a Member of the Appellate Body.[226] In deciding on the reasonable period of time for implementation, a principal guideline has been that such period "should not exceed 15 months from the date of adoption of a panel or Appellate Body report"; however, that period "may be shorter or longer, depending upon the particular circumstances." [227] In European Communities – Hormones, the arbitrator found that the reasonable period of time, as determined under Article 21.3 (c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.[228] In the same case, the arbitrator noted that when implementation does not require changes in legislation but can be effected by administrative means, the reasonable period of time "should be considerably less than 15 months".[229] In recent arbitrations, the reasonable period of time for implementation has ranged from 8 months in *Australia - Salmon* to 15 months and one week *in European Communities - Bananas.*

The DSB keeps under surveillance the implementation of adopted recommendations and rulings.[230] At any time following adoption of the recommendations or rulings, any WTO Member may raise the issue of implementation at the DSB. Starting six months after establishment of the reasonable period of time, the issue of implementation of the recommendations or rulings is placed on the agenda of each DSB meeting and remains on the DSB's agenda until the issue is resolved. At each DSB meeting, the Member concerned provides a status report of its progress in implementing the DSB recommendations or rulings.[231]

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[224] DSU, n.12.

[225] Japan – Alcoholic Beverages, European Communities – Bananas, European Communities – Hormones, Indonesia – Automobile Industry, Australia – Salmon and Korea – Alcoholic Beverages.

[226] This has been so even in a case where no appeal from the panel report was taken. *See: Indonesia – Automobile Industry.*

[227] DSU, art. 21.3 (c).

[228] Arbitration Award under art. 21.3 (c) of the DSU, *European Communities – Hormones*, para. 26.

[229] *Id.* at para. 25. *See also* Arbitration Award under art. 21.3 (c) of the DSU, *Australia – Salmon*, para. 38.

[230] DSU, art. 21.6.

[231] Id.

Where there is disagreement as to whether the Member concerned has indeed taken measures to comply with the recommendations and rulings, or whether these measures are consistent with a covered agreement, Article 21.5 of the DSU provides that such disagreement shall be resolved through recourse to the DSU dispute settlement procedures. If possible, the original panel adjudicates this subsequent dispute. The panel must circulate its report within 90 days after referral of the matter to it.[232] During the period 1995-1999, 6 such implementation disputes under Article 21.5 of the DSU were referred to the original panel.[233]

In the event that the Member concerned fails to bring the WTO-inconsistent measure into conformity with, or otherwise fails to comply with the DSB recommendations and rulings within the reasonable period of time, such Member must, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with the complaining party with a view to developing mutually acceptable compensation.[234] Compensation is voluntary and, if granted, must be consistent with the covered agreements.[235] If no satisfactory compensation has been agreed on within 20 days after expiry of the reasonable period of time, the complaining party, upon its request, may be granted authorization by the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.[236] The request for authorization to suspend is granted within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request.[237]

However, if the non-complying Member objects to the level of suspension proposed or claims that the principles and procedures for suspension have not been followed, the matter may be referred to arbitration before the DSB takes a decision.[238] The level of the suspension of concessions and other obligations to be authorized by the DSB must correspond to the level of the nullification or

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[232] DSU, art. 21.5. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

[233] *European Communities – Bananas* (recourse by Ecuador), *European Communities – Bananas* (recourse by the European Communities), *Australia – Salmon* (recourse by Canada), *Australia – Leather* (recourse by the United States), *Brazil – Aircraft* (recourse by Canada) and *Canada – Aircraft* (recourse by Brazil).

[234] DSU, art. 22.2.

[235] DSU, art. 22.1.

[236] DSU, art. 22.2.

[237] DSU, art. 22.6.

[238] DSU, art. 22.6. Concessions or other obligations shall not be suspended during the course of the arbitration.

impairment.[239] The general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body found a violation or other nullification or impairment. However, if the complaining party considers that it is not practicable or effective to suspend concessions with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement, or if that too is not practicable or effective and the circumstances are serious enough, concessions or other obligations under another covered agreement.[240] The arbitration on the level of the suspension or on the compliance with the suspension principles and procedures is carried out by the original panel, if the members thereof are available, or by an arbitrator appointed by the Director-General.[241] The arbitration must be completed within 60 days after expiry of the reasonable period of time[242] and no second arbitration is possible.[243] The DSB is informed promptly of the decision of the arbitrator and grants, by reverse consensus, the requested authorization to suspend concessions or other obligations, where the request is consistent with the decision of the arbitrator.[244] During the period 1995-1999, the DSB has granted authorization to suspend concessions and other obligations in two disputes. In European Communities – Bananas, the DSB authorized the United States to suspend concessions to the European Communities in an annual amount of US$ 191.4 million.[245] In European

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[239] DSU, art. 22.4. The arbitrator shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification of impairment (art. 22.7 of the DSU). The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement (art. 22.7 of the DSU).

[240] DSU, art. 22.3 (a) to (c). For further principles and procedures, *see* DSU, art. 22.3 (d) and (e). *See also:* Decision by the Arbitrators, *European Communities – Bananas*, recourse to arbitration by the European Communities under art. 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000. With respect to goods, "sector" means all goods. With respect to services, "sector" means one of the 11 principal sectors identified in the current "Services Sectoral Classification List" (MTN.GNS/W/120). With respect to TRIPS, "sector" means each of the categories of intellectual property rights covered in Part II or the obligations under Part III or Part IV of the *Agreement on TRIPS* (art. 22.3 (f) of the DSU).

[241] DSU, art. 22.6.

[242] Id.

[243] DSU, art. 22.7.

[244] Id.

[245] Decision by the Arbitrators, *European Communities – Bananas*, recourse to arbitration by the European Communities under art. 22.6 of the DSU, WT/DS27/ARB, 9 April 1999. Note that on 8 November 1999, Ecuador requested authorization from the DSB to suspend the application to the EC of concessions or other obligations in an amount of US$ 450 million. The European Communities requested arbitration on the level of suspension requested by Ecuador.

Communities – Hormones, the DSB authorized Canada and the United States to suspend concessions to the European Communities in an amount of CAN$ 11.3 million and US$116.8 million per year, respectively.[246] In both disputes, propriety of the proposed level of suspension was referred to the original panel for arbitration under Article 22.6 of the DSU.[247]

It is arguable that neither compensation nor the suspension of concessions or other obligations is properly regarded as an alternative to compliance. WTO Members have an international law obligation to comply with the recommendations and rulings adopted by the DSB. Compensation and the suspension of concessions or other obligations are temporary measures available as a last resort in the event that the recommendations and rulings are not implemented by the defaulting Member within the reasonable period of time.[248] The suspension of concessions and other obligations are authorized only as long as justified by the failure of implementation.[249] The DSB continues to keep the matter under surveillance.[250]

The relationship between an Article 21.5 procedure regarding the implementation and an Article 22 request for authorization to suspend concessions or other obligations has been the source of considerable controversy. In European Communities – Bananas, the question arose whether, in a case where the parties disagree as to the consistency with the covered agreements of the measures taken to comply with the DSB recommendations and rulings, a party can request, and be granted, authorization to suspend concessions or other

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See: Decision by the Arbitrators, *European Communities – Bananas*, recourse to arbitration by the European Communities under art. 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000.

[246] Decision by the Arbitrators, *European Communities – Hormones* (original complaint by the United States), recourse to arbitration by the European Communities under art. 22.6 of the DSU, WT/DS26/ARB, 12 July 1999 and Decision by the Arbitrators, *European Communities – Hormones* (original complaint by Canada), recourse to arbitration by the European Communities under art. 22.6 of the DSU, WT/DS48/ARB, 12 July 1999.

[247] In both cases, the level of nullification suffered by the party requesting the suspension was found to be significantly lower than the proposed level of suspension In *European Communities – Bananas*, for example, the United States had proposed a level of suspension equal to US$ 520 million. The arbitrators determined that the level of nullification suffered by the United States to be equal to US$ 191.4 million.

[248] DSU, art. 22.1 and 22.8. Art. 3.7 of the DSU states with regard to compensation that the provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.

[249] DSU, art. 22.8.

[250] Id.

obligations before a panel under Article 21.5 has ruled on the WTO-consistency of the implementation measures.[251] Many Members have taken the position that pursuant to Article 23 of the DSU, a Member cannot be granted authorization to suspend concessions or other obligations until after the WTO-inconsistency of the measures taken to comply with the DSB recommendations and ruling has been established through recourse to Article 21.5 of the DSU. However, it is possible to argue from the text of Article 22.6 of the DSU that the time-frame within which to obtain authorization to suspend concessions or other obligations, does not allow for recourse to Article 21.5 of the DSU after the expiry of the reasonable period of time for implementation. It is clear that the relationship between recourse to Article 21.5 and recourse to Article 22 of the DSU will need to be clarified.

CONCLUDING REMARKS

At the time of adoption of the WTO Agreement, it was agreed that the WTO Ministerial Conference would complete a full review of the DSU within four years after the entry into force of the WTO Agreement, and subsequently take a decision on whether to continue, modify or terminate the DSU.[252] In the context of this review of the DSU which took place in 1998 and 1999, Members made a large number of proposals and suggestions for further improvement of the dispute settlement system. In the run-up to and during the Seattle Ministerial

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[251] In *European Communities – Bananas*, the DSB agreed on 12 January 1999, at the request of Ecuador, to reconvene the original panel to examine whether the measures taken by the European Communities to implement the DSB recommendations were WTO consistent. On 14 January 1999, the United States requested, pursuant to art. 22.2 authorization from the DSB to suspend concessions to the European Communities in an amount of US$ 520 million. On 26 January 1999, the European Communities requested, pursuant to art. 22.6, arbitration on the level of suspension of concessions requested by the United States. The arbitrators under art. 22.6, who were the original panelists, determined the level of nullification suffered by the United States to be equal to US$ 191.4 million. The art. 21.5 panel requested by Ecuador found that measures taken by the European Communities to implement the DSB recommendations were not fully compatible with the WTO. The arbitrators' report and the report of the 21.5 panel were issued to the parties on 6 April 1999, and circulated to Members on 9 and 12 April 1999, respectively. On 9 April 1999, the United States requested the DSB to authorize suspension of concessions to the European Communities in an amount of US$ 191.4 million. On 19 April 1999, the DSB authorized the United States to suspend concessions to the European Communities in that amount.

[252] *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, published in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Cambridge University Press, 1999), 465.

Conference in December 1999, Members made a considerable but unsuccessful effort to reach agreement on modifications to be made to the DSU. While during the first five years of its operation the dispute settlement system has functioned reasonably well and has shown itself capable of handling complex and sensitive disputes, it is clear that some elements and characteristics of the current dispute settlement system underscore the need for further development. We are confident, however, that in view of the need for an effective dispute settlement system to provide predictability and stability to the multilateral trading system, the system will continue to develop on the basis of the experience that is gradually being acquired.

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