

WTO Dispute Settlement: Introduction and Procedural Steps

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Part I

Introduction to WTO Dispute Settlement:

9 Key Principles

#1. The WTO has a single dispute settlement system covering all agreements

- The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) applies to all WTO agreements, including:
 - General Agreement on Tariffs and Trade
 - Other WTO agreements on trade in goods (e.g. TBT Agreement)
 - General Agreement on Trade in Services
 - Agreement on Trade-Related Aspects of Intellectual Property Rights
 - Accession Protocols

#2. A complaint must be brought by a WTO Member government

- May be brought by any WTO Member
- May be brought by more than one Member (co-complainants)
- The fact that it is brought by a Member does not mean that industry is not actively involved

#3. A complaint can only be against another WTO Member

- Cannot request an advisory opinion on the interpretation of a provision
- Cannot bring a case against the World Trade Organization itself, or a WTO body
- Cannot bring a case against non-WTO Members

#4. A complaint must be against a measure attributable to that WTO Member

- Laws as such
- Administrative actions by any government department or agency
- Other:
 - Court decisions
 - Provincial and local governments
 - Private conduct if controlled or influenced by State

#5. A complaint must allege a violation of one or more specific WTO legal obligations

- Cannot challenge measures simply because they harm trade
- Cannot claim a violation of other international treaties, including other international trade agreements
- Cannot claim based on another country violating its own national law.

#6. Responding Member cannot block the process or the decision

- All Members consent to jurisdiction upon becoming Members of the WTO
- All steps in the dispute settlement procedure occur automatically upon request of the complaining party (establishment, composition, adoption)
- Under the old system of the GATT (1947-1994), consensus was required and therefore the responding Member could block the final decision from being adopted

#7. Cases are resolved exclusively on the basis of law

- Must be allegation of violation of legal obligation in the text of the WTO agreements
- Issues of treaty interpretation resolved on the basis of Articles 31-32 of the Vienna Convention on the Law of Treaties
- Cases not resolved on basis of policy, politics, or diplomacy (contrast early GATT working party reports)
- No “political question” rule or other basis to decline to rule on dispute

#8. Must use WTO dispute settlement system before taking WTO-inconsistent countermeasures

- Under general international law, unilateral countermeasures are permitted (often because there is no alternative)
- Under the WTO treaty, States agree to have recourse to the dispute settlement system to address violations

#9. There are no monetary damages in the WTO dispute settlement system

- In case there is a finding of violation, responding Member must bring measure into conformity moving forward.
- If it does not, then complaining party may impose countermeasures, but only relating to lost trade moving forward.
- There are no monetary damages, and no compensation for harm caused in the past.

Summary – Questions?

- 1) **The WTO has a single dispute settlement system covering all agreements**
- 2) **A complaint must be brought by a WTO Member government**
- 3) **A complaint can only be against another WTO Member**
- 4) **A complaint must be against a measure attributable to that WTO Member**
- 5) **A complaint must allege a violation of one or more specific WTO legal obligations**
- 6) **Responding Member cannot block the process or the decision**
- 7) **Cases are resolved exclusively on the basis of law**
- 8) **Must use WTO dispute settlement system before taking WTO-inconsistent countermeasures**
- 9) **There are no monetary damages in the WTO dispute settlement system**

Part II

Procedural Steps in WTO Dispute Settlement:

16 Key Steps

#1. Consultations

- Every dispute begins with a request for consultations by the complaining Member
- Request is made in writing, and must identify respondent's measures at issue and legal provisions violated; circulated to all Members
- Consultations are confidential (Secretariat not present)
- Time-frame: if not resolved within 60 days from date of request, complainant may request establishment of panel
- Objectives of consultations: resolve dispute without litigation; allow complainant to obtain more information

#2. Panel Request

- Complaining party may file request after 60 days from date of consultations request
- Panel request has three legal requirements:
 - Must identify “the specific measures at issue”
 - Must identify “the legal basis of the complaint”
 - Must be “sufficient to present the problem clearly” (without advancing arguments)
- Panel established at second DSB meeting following request (unless responding party agrees at first)
- Panel request becomes the panel’s “terms of reference”, and a panel cannot make findings on measures or claims not identified in the Panel request

#3. Selection of Panelists

- 3 individuals in all cases to date
- Governmental (e.g. delegates, Ambassadors, from capital) or non-governmental (e.g. private sector lawyers, law professors)
- Neutral and independent of any government
- Process:
 - Secretariat obtains criteria from disputing parties (e.g. experience with trade remedy investigations);
 - Secretariat proposes names based on criteria;
 - either party can block any name;
 - if parties cannot agree, complaining party can request Secretariat Director-General to select the Panelists

#4. Organizational Phase

- Each panel sets its own Timetable (for meetings, written submissions, etc.) and Working Procedures
- Panels normally make Timetable longer than envisaged in Appendix 3, para. 12 of the DSU
- Following selection of panel, the Panel sends draft Timetable and Working Procedures to parties for comment
- A short organizational meeting is held to give parties opportunity to comment on TT and WPs (often in writing as well)
- The Panel then finalizes the TT and WPs

#5. First Written Submissions

- Anywhere from 40 to 800+ pages long
- Complainant's FWS presents its factual and legal arguments on all claims
- Accompanied by evidence submitted simultaneously as Exhibits
- Responding party then submits its first written submission several weeks later and attempts to rebut complainant's claims and/or invokes exceptions or other defences

#6. Third Party Submissions

- Any WTO Member has the right to participate as a third party in a panel proceeding (practice is to notify within 10 days of DSB meeting where panel was established)
- Most cases involve a number of third parties
- Third party rights are set forth in Article 10 of the DSU, and include the right to make a written submission prior to the first meeting
- Third party submissions normally address questions of treaty interpretation raised in parties' first written submissions

#7. First Meeting

- Parties read their oral statements
- Parties given right to put questions to one another
- Panel will ask questions of the parties, some of which may be sent in advance to help the parties prepare
- There is a separate third party session, at which third parties make oral statements and respond to questions from the parties and Panel
- Open vs. Closed Hearings? (to date, opened if both parties agree)
- Protocol & formalities at Panel meetings? No robes, no wigs, no “Your Honour” or other titles)

#8. Responses to Written Questions

- Panel sends written questions to parties (and third parties) shortly after the hearing
- The number varies considerably depending on the number of claims and factual issues (average 40-80 questions)
- Wide range of questions – clarifying positions and arguments, addressing weaknesses in arguments, clarifying any factual issues)
- Often given 2 weeks to respond

#9. Second written submissions, hearing, questions

- A second round, with the following differences:
 - Submissions are simultaneous
 - No third party submissions and not present at 2nd meeting
 - Parties are allowed to make comments on the other party's written responses to the 2nd set of questions
- In sum: each party makes 2 written submissions, there are 2 meetings / oral statements, and 2 sets of written questions

#10. Interim Review

- Panel sends parties its report, with an opportunity to request changes on precise aspects of the report
- Requests may cover factual issues, legal issues, or how parties' arguments are presented
- Unusual but not unprecedented for Panel to change its conclusion on a claim following interim review comments

#11. Final Report

- Reflects discussion of interim review comments
- First sent to parties, confidentially
- Publicly circulated to all Members following translation into the other 2 official languages
- May include dissenting opinion by panelist

#12. Appellate Body

- 7 Appellate Body members, 3 serving on each appeal
- A disputing party can appeal any legal findings in a panel report that it disagrees with
- Appeals are limited to “issues of law and legal interpretation” in the panel report
- Notice of Appeal must identify the alleged legal errors, the legal provisions in question, and the paragraphs of the Panel report containing the errors
- 68% of panel reports appealed
- Detailed Working Procedures for Appellate Review (32 articles dealing with all aspects)
- 90-day deadline from the Notice of Appeal

#13. Reasonable Period of Time

- If violation, then responding member given “reasonable period of time” to comply, which is:
 - Article 21.3(b) – period mutually agreed by disputing parties in the case (*average: 9.5 months*)
 - Article 21.3(c) – period determined through arbitration (*average: 11.3 months*)
- RPT is calculated from the date of the adoption of the Panel / Appellate Body Report by the Dispute Settlement Body:
 - within 60 days of circulation of Panel Report, or
 - within 30 days of circulation of Appellate Body Report

#14. Compliance proceedings

- Article 21.5 of the DSU requires another proceeding where there is a disagreement as to the existence or WTO-consistency of measures taken to comply
- Normally conducted by the same panelists
- Supposed to be completed within 90 days from the date referred to the compliance panel
- Compliance panel findings can also be appealed

#15. Arbitration to Determine Level of Suspension

- If the responding Member is found to have not brought the measures into conformity within the reasonable period of time, complaining party can request authorization to suspend concessions or other obligations
- If responding Member objects to the level of suspension proposed, then the matter is referred to arbitration under Article 22.6 of the DSU
- Level of suspension may be based on estimates of lost exports
- Can be in different sector, and under different agreement (e.g. TRIPS)

#16. Mutually Agreed Solution

- Settlement between the parties:
 - Compliance by the responding Member, or
 - Another settlement reached by the two parties which keeps the WTO-inconsistent measure in force (e.g. \$\$\$ payment to complaining Member)
- Must be notified to the Dispute Settlement Body

Summary – Questions?

- 1) Consultations
- 2) Panel Request
- 3) Panel Selection
- 4) Organizational Phase
- 5) Written Submissions
- 6) Third Party Submissions
- 7) First Meeting
- 8) Written Questions
- 9) Second submissions, hearing, questions
- 10) Interim Review
- 11) Final Report
- 12) Appellate Review
- 13) Reasonable Period of Time
- 14) Compliance Proceedings
- 15) Arbitration to Determine Level of Suspension
- 16) Mutually Agreed Solution