

LL.M. in International Legal Studies



WTO LAW

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Part IV – Dispute Settlement 2

Panel procedure

- **Oral** hearings, on basis of written submissions
- Third parties with "substantial interest" may make presentations
- Panels may seek scientific advice from an **Expert Review Group**
- **Interim Review** (draft report) to parties

- Final Report issued to parties
- Final Report circulated to all members (3 weeks after parties received it)
- Adoption of **Panel Report** within **60 days** of circulation, by negative consensus
- -> ca. **9 months** from establishment of panel to adoption of report (**12 months** where report is appealed)

Appellate review

- Appeals limited to "issues of law and legal interpretations developed by the panel"
- **Appellate Body** (3 out of 7 members with recognized expertise in international trade law)
- Report of Appellate Body "may uphold, modify or reverse the legal findings and conclusions of the panel", adoption within **30 days** of circulation to members (rejection requires consensus)
- Appellate Body Report is final and binding

Implementation

- If there is a finding of violation:
- Member must bring the measures into conformity with its WTO obligations
- Member must inform DSB of its intentions to comply within 30 days
- Determination of "reasonable period of time,, for implementation
- Surveillance by the DSB (status reports on implementation)

- If there is disagreement as to the existence or consistency of implementation measures with a covered agreement -> „compliance panel“ can be established (Art. 21.5 DSU)
- Panel decides
 - (1) whether there is **disagreement** with a covered agreement of measures taken to comply with the recommendations and rulings
 - (2) on the **existence** of the implementation of measures and
 - (3) whether the measures are **consistent with the WTO rules**

- If member fails to comply within reasonable period of time, possibility of
- **Compensation** (voluntary, negotiated, WTO compatible)
- if no compensation agreed within **20 days**, complainant may ask for:
- **Retaliation/suspension of concessions** - authorization of trade sanctions by DSB "equivalent to the level of nullification or impairment" within **30 days**
 - Concessions have to be suspended **primarily in same sector** – if this is not possible, also retaliation **under other sectors of the same agreement** can be authorised
 - In exceptional cases -> (**cross retaliation** = suspension of concessions under other WTO-agreements) is possible

Law enforcement - shortcomings

- In general, the WTO dispute settlement system has proved to be a **real success** – it has become a “central instance” for the settlement of international trade conflicts
- But: there are still **shortcomings**, esp. as regards **law enforcement**:
- The suspension of concessions creates an **additional barrier to trade** instead of liberalisation
- **Lack of rights of individuals** concerned (only states may lodge a complaint)
- **Lack of punishing character** for economic **powerful countries** – sometimes the continuation of a breach is more desirable than compliance, like in the Beef Hormones Case

- **High cost of the sanctions** also for the „sanctioning member“
 - Importers of goods are highly affected by the raise of tariffs – f.ex. in the Foreign Sales Corporations case, the EC had problems to find enough products on which it could impose additional tariffs
- **Imbalance between developed and developing countries**: often hard for developing countries to find concessions they could suspend – additionally, they do not have the means and the power to put economic pressure especially on developed countries
- The dispute parties as the „masters of the dispute“ – no „*ex officio*“ principle

Special provisions for developing countries

- During **consultations**, Members should give special attention to the particular problems and interests of developing country Members (Art. 4.10 DSU)
- **Panel Stage:**
 - Dispute between a developing country Member and a developed country Member -> the panel must, upon request by the developing country Member, include at least one panelist from a developing country Member

- If DC Member is the respondent -> panel must accord it **sufficient time to prepare** and present its defence (but this must not affect the overall time period for the panel to complete the dispute settlement procedure – Art. 12.10 DSU)
- **Implementation:**
 - Particular attention be paid to matters affecting the interests of developing country Members (Art. 21.2 DSU)
 - This provision has already been applied repeatedly by arbitrators acting under Article 21.3(c) DSU in their determination of the reasonable period of time for implementation

Accelerated procedure at the request of a DC Member

- Legal basis: **Decision of 5 April 1966**
- If a DC Member brings a complaint against a developed country Member, the complaining party has the discretionary right to invoke, as an **alternative** to the relevant provisions in the DSU, the **accelerated procedures** of the Decision of 5 April 1966
- Director-General supports DC - may use his good offices, and conduct consultations at the request of a DC
- The time-frames have not yet been applied in the WTO (and only once under GATT 1947; DCs prefer to have more time for preparation)

Example: The bananas

EC banana regime 1993-98

- Common Organisation of the Market in Bananas adopted by the EC in 1992 in view of the internal market
- EU banana price above world price -> quota rent for preferred suppliers
- **Tariff-free** quotas for ACP bananas and **20%** tariff quotas for dollar bananas, and **prohibitive tariffs** for imports **beyond** those quotas
- Commission issued **import licenses** to banana distributors (2/3 European/ACP and 1/3 other importers)

GATT banana disputes

- **Banana I:** 1993 Costa Rica, Colombia, Venezuela, Nicaragua & Guatemala request panel on GATT compatibility of national European regimes and partly win (Lomé waiver for tariffs) -> **vetoed** by EU
- **Banana II:** 1993 same countries request panel on new common EU regime and win -> **vetoed** by EU
- **1994 Framework Agreement on Bananas:** EU – Colombia, Costa Rica, Venezuela, Nicaragua (national quotas in return for suspending complaint)

WTO banana disputes

- **Banana III:** 1995/96 complaint by US, Guatemala, Honduras, Mexico & Ecuador -> quota system & import licences are WTO incompatible
- 1997 EU **appeals** but Appellate Body confirms ruling
- **1999** EU introduces **new licensing system** but still uses tariff quotas -> challenged by US and Ecuador -> WTO authorizes **trade sanctions** (US \$192 mio, Ecuador \$202 mio)
- In 2001 EU agrees **new regime** based on **tariffs** by **2006**

- 2001 “**Understanding on Bananas**“ between the EC and the US and between the EC and Ecuador
- In November 2006 Ecuador, followed by Colombia, Panama, the US and others, requests **consultations** on the EU import regime
- In June 2007 the WTO **establishes a panel** on request of Ecuador, in August 2007 a panel requested by the US
- Reports of the Compliance Panel (Art. 21.5 DSU) published on 8 May 2008
- **Geneva Agreement on Trade in Bananas** (December 2009): Agreement between the EU and Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela