

Dispute Settlement and the WTO

DDE NALSAR 15 March 2024



Overview

- GATT Dispute Settlement System
- Overview of Dispute Settlement Understanding
- Various stages of WTO DSS

GATT DSS



Since GATT was a provisional instrument, it only had two provisions for resolving trade disputes- Articles XXII and XXIII of the GATT, 1947



GATT emphasized more on positive consensus in decision making.

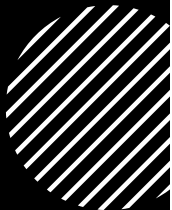
Article XXII: Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.



Key words from the provision



Adequate opportunity for
consultation



Sympathetic consideration



If this, at the bilateral level, does
not resolve the trade dispute, then
there will be multilateral
consultation by the
CONTRACTING PARTIES.

Article XXIII: Nullification or Impairment

- If there is a trade dispute and consultations fail, the complaining country can make written representations or proposals.
- Then the Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties or give a ruling on the matter, as appropriate.

Article XXIII: Nullification or Impairment

- If the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.
- Key term- Suspension of concessions or other obligations

Article XXIII: Nullification or Impairment

- If the responding country still does not withdraw or modify the trade measure, then it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

Problems in GATT DSS



Sparse provision- no institution or body for DSS



Initially with smaller number of contracting parties, it was relatively easy for positive consensus for decision making and all countries hearing the trade dispute.



Difficult to arrive at consensus with many countries signing GATT



Many understandings were signed to strengthen the GATT DSS during the GATT era

GATT era DSS

For instance, the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance was signed in 1979.

But some countries adopted the practice of 'blocking' whenever a trade dispute was filed. It was mostly the EC and the US.

Contracting Parties developed a practice of appointing panels to hear trade disputes, some countries will block the appointment of panels itself if a case is brought against that country.

Or these countries may block the adoption of panel report if it is adverse to them.

Requirement of positive consensus created lot of problems in GATT DSS

GATT era DSS

In the 1982 Ministerial Meeting, Contracting Parties passed a resolution for departure from positive consensus requirement.

So the US resorted to the practice of unilateral actions and enacted Trade Act in 1974 where it can impose adverse trade measure against a particular country.

So many countries wanted to address unilateral action, subsequently Punta del Este Declaration was made to strength the DSS in 1987.

In Uruguay Round Negotiation, even EC also agreed for changes in the DSS.

Finally, the Understanding on Rules and Procedures Governing the Settlement of Disputes (also in short known as Dispute Settlement Understanding) was agreed.

Dispute Settlement Understanding (DSU)

- DSU is extensive compared to GATT provisions
- Over 622 disputes have been brought before the WTO DSS.
- It has 27 Articles and 4 Appendixes
- It provides different mechanisms for resolving disputes.
- It established Dispute Settlement Body for administering the DSU.



First stage of WTO DSS- Consultation

- This was there in the GATT era also.
- DSU provides that disputing parties should try to find an amicable solution to their dispute.
- The DSU lays down certain requirements for consultations-
 - The request for consultation should be in writing and should contain the reasons for requesting consultations.
 - The request should identify the measure-at-issue and provide a legal basis for the complaint.
 - If the parties arrive at a mutually acceptable solution to their dispute, it should be consistent with 'covered agreements'
 - Appendix 1 of the DSU lists out the agreements over which DSU extends its jurisdiction, they are called covered agreements.
 - Strict timeline is provided for this process.

Third Party

- Often, it is the case that a trade measure of one WTO Member may affect many other WTO Members.
- So even if one WTO Member initiates the consultation process with the country with the alleged trade measure, some other WTO Members who are affected by that challenged trade measure can join the consultation process as a third party.
- This is subject to few requirements mentioned in the DSU:
 - That WTO Member wishing to join as third party should have “substantial trade interest” in the subject matter of the dispute.
 - That WTO Member should notify the consulting parties in writing within the timeline provided in the DSU.
 - The Responding Member, the country with the alleged trade measure should accept the request.



Panel Review

- If the consultations fail, the complaining Member may request the DSB to establish a panel to hear the dispute.
- To make the request for the establishment of a panel, the complaining Member should give a request in writing and also by indicating whether consultations were held.
- This panel request should also identify the measure-at-issue and the legal basis for complaint.
- When this request is made to the DSB, it will be added to the agenda for the upcoming DSB meeting.
- Either in the first or latest by the second DSB meeting following the request, the DSB will decide to establish a panel.

Panel Review

- In GATT era, there were few instances of some countries blocking the establishment of panel.
- Thus, DSU introduces 'negative consensus' as the basis of decision making to decide if the panel has to be established or not.
- Negative consensus indicates that unless all WTO Members present in the DSB meeting says no to a particular action, that action will be carried out.
- So in case of panel establishment, at least the complaining Member will vote in favour of establishing a panel.
- Thus, introduction of negative consensus addressed the GATT era problem of blocking panel establishment.
- At the maximum, the responding Member can delay panel establishment by saying that there is mutually agreed solution only in that meeting where the matter is discussed. By the second meeting, the panel will be established.

Third parties in panel review

- Once the panel gets established, other WTO Members interested in the dispute may join the panel proceedings as third parties.
- But if multiple requests for panel establishment comes before the DSB regarding one trade measure, the DSB may establish one panel for multiple complaints.
- Also, if the timing of the complaints differed and the panel for the first complaint is established, and subsequently, another Member files a request for establishing the same panel, the DSB may appoint the same panel members in the subsequent case as well.

Composition of Panel

- After the DSB establishes a panel, the next stage is composition of panel.
- DSU provides that ordinarily the panel should be composed of three persons and this should be done within 10 days from the establishment of panel.
- So the process of selecting the panelists commences.
- WTO Secretariat proposed the names of potential panelists and it has a list of such persons.
- Such persons should be independent with good qualifications.
- Unless there is compelling reasons, the names proposed should not be objected by the disputing parties.
- So usually, the DSB easily agrees on three persons.

Composition of Panel

- But in case if the disputing parties do not agree on the panelists, the Director General of WTO can appoint the panelists in consultation with the Chairperson of the DSB and Chairperson of the relevant Councils and Committees.
- More often, we see the DG appointing one of the panelists.
- There is no express bar in the DSU with regard to the nationality of the panelists but in reality, the nationals of disputing parties are not appointed as panelists.
- One exception- In a US and EU dispute, US- Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) case, there were panelists from the US and Germany.

Rules of Conduct

- Once the panelists are chosen, they are bound by the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct) which was adopted by the DSB.
- Not just the panelists but even other staff assisting the panelists like experts and other WTO Secretariat staffs are also subject to the Rules of Conduct.
- This Rules of Conduct is aimed at maintaining the integrity, impartiality and confidentiality of the proceedings.
- So, accordingly, the panelists have to disclose any information likely to affect their independence.

Panel Proceedings

- After the composition of panel, panel proceedings commence in accordance with the procedure given in Appendix 3 of the DSU.
- Panel proceedings start with an initial organizational meeting where the panel set the timetable for proceedings after consulting the disputing parties.
- Then the panel goes to the submission stage where the disputing parties and third parties make their written submissions.
- Then the panel meets in closed session with disputing parties and third parties.
- Panel issues a preliminary report at the request of the disputing parties. There is no such provision in the DSU but it is practiced in reality.
- After hearing the parties views, the panel issues a final report.

Panel proceedings



- Two notable things from panel proceedings are-
 - Objective assessment of the matter before the panel- Art 11 of the DSU imposes this obligation
 - Taking the advice from experts and other relevant sources to better understand the submissions- Art 13 of the DSU

Panel Report

Panel report has many stages-

First the panel issues a report describing the facts and arguments of the disputing parties. The parties may comment on it.

Interim report

Final report



Then final report is issued and circulated to all WTO Members after translating into three official languages of the WTO.

Appellate Review

If either disputing party wants to appeal the panel report, they can do so.

For the purpose of hearing appeals, the DSU establishes a standing Appellate Body with 7 members.

Each member has a term of four years which can be renewed for another 4 years.

Each year a certain number of AB members retires and new members are added.

If a seat goes vacant because of resignation or death before the expiry of the term, the newly appointed member will serve only for the remainder of that term.

These seven members should be persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

Selection of AB Members



The AB members are selected after a rigorous selection process.



A selection committee is constituted with the following members:

Chair of General Council

Chair of DSB

Chair of Council for Trade in Goods

Chair of Council for Trade in Services

Chair of Council for TRIPS

WTO Director General

Selection of AB Members



WTO Members are invited to give nominations and usually the practice is to nominate their nationals.



Once nominations are received, the selection committee will interview every nominated individual and recommend suitable candidate to the WTO Members



Final selection is made in a DSB meeting through positive consensus.



Please note decision making is through positive consensus.



Finally the AB Members are selected through this rigorous process.



AB Members are also subject to the Rules of Conduct.

Appellate Review

- Article 17 of the DSU provides for appellate review.
- Appendix 3 of the DSU only deals with the Working Procedures for panel review so Art 17.9 lays down that the AB itself will adopt its own working procedures.
- Accordingly, the AB drew up its Working procedures for Appellate Review in consultation with the chairperson of the DSB and the WTO DG.



Initiating Appellate Review

- After the circulation of the Panel Report, either one or both the disputing parties can prefer an appeal of the panel report to the AB.
- A third party to the panel proceedings cannot prefer an appeal.
- A WTO Member who was not a third party in panel proceedings cannot become a third party in appellate review.
- Appeal process starts with the notice of appeal.

Initiating Appellate Review

- Notice of appeal includes the following:
 - Identification of alleged errors made by the panel
 - A list of legal provisions of the covered agreement that the panel is alleged to have erred in interpreting that provision
 - An inductive list of paragraphs of the panel report containing the alleged errors

Appellate Review

- AB can only hear questions of law and not questions of fact.
- But Article 11 of DSU is frequently invoked to hear questions of fact.
- Appeal is heard by a division of three AB members.
- Three AB members should decide the appeal through consensus and if consensus could not be reached, then through majority voting.
- However, opinions expressed by AB members are anonymous.

Appellate Review

- In some cases, AB cannot decide a question due to insufficient factual findings in the panel report.
- AB prepares a report containing a brief description of the facts, arguments of the disputing parties and third parties.
- This report will also include a brief overview of the measure at issue and its findings and conclusions.
- AB's findings will generally be either upholding the panel report or modifying the panel report or reversing the panel report.
- DSU provides that AB report should be circulated within 60 days from when the appeal is initiated. This time can be extended to 90 days.

Adoption of Panel and AB reports by the DSB

- Once the AB report is circulated to all WTO Members, the DSB moves to adopt the reports.
- Reports here refer to panel report and AB report.
- If the disputing parties do not appeal, then the DSB goes ahead with the adoption of panel report.
- Adoption of reports by DSB is significant as unadopted reports are not binding.
- In the GATT era, there were many unadopted reports so the DSU prescribes negative consensus as the decision making norm for the adoption of reports by DSB.

Compliance with DSB recommendations

- Once the reports are adopted, it will not be referred as panel findings or AB findings, it will be called as DSB recommendations.
- WTO Members have an obligation to comply with DSB recommendations.
- Primarily, the responding Member should withdraw the trade measure which is found to be inconsistent with its WTO obligations.
- But modifying that trade measure is also allowed if that removes the inconsistency.

Reasonable Period of Time

- Once the reports are adopted, the responding Member informs the DSB that it will implement the DSB recommendations within a reasonable period of time.
- DSU provides for determining the RPT but ordinarily it is 15 months.
- Please note that DSB recommendations are prospective in nature.
- Thus, the responding Member tries to extend the RPT as much as possible.
- General obligation- responding Member should go for immediate compliance and can only request for RPT in exceptional cases

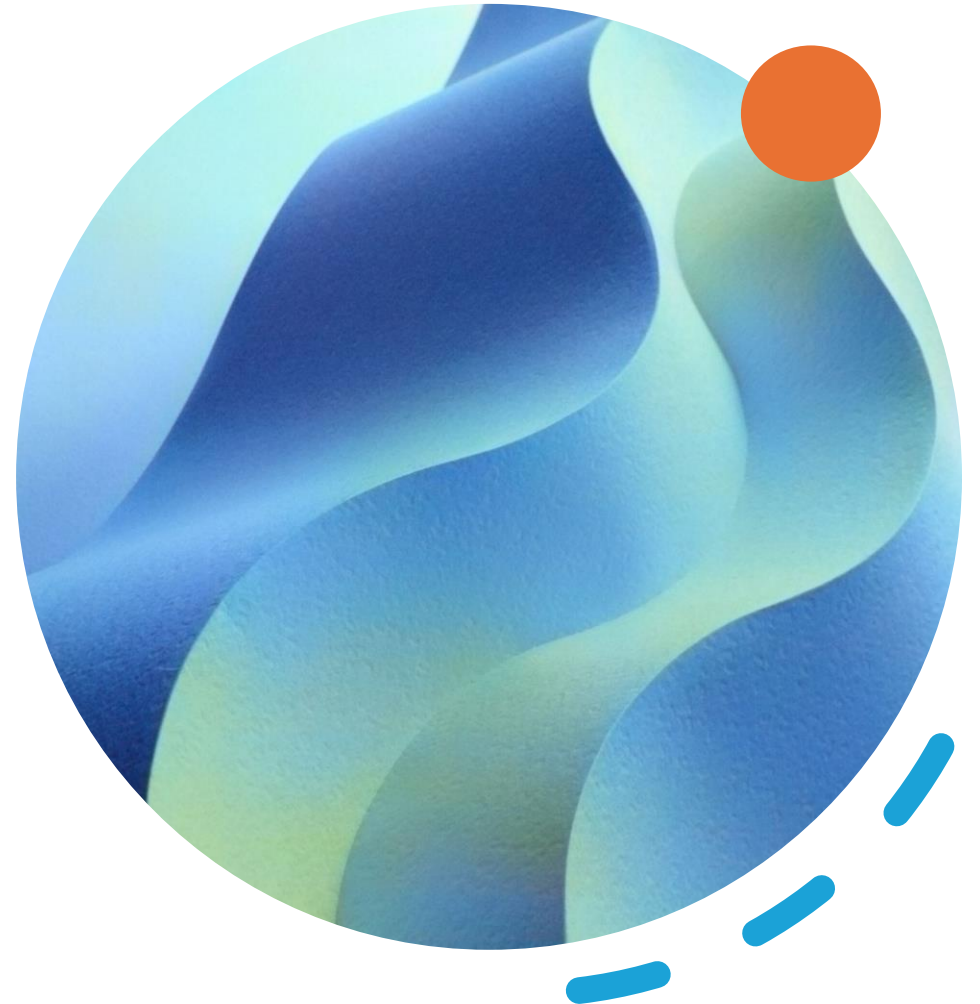
Multilateral surveillance by the DSB



After RPT expires, the responding Member has to submit the status report as to the implementation of DSB recommendations in the next DSB meeting.



Thus, there is multilateral surveillance with regard to implementation of the DSB recommendations



Compliance proceedings under Article 21.5 of the DSU



When the responding Member claims that it has complied with the DSB recommendations but the complaining Member disagrees, then the complaining Member can initiate compliance proceedings under Art 21.5 of the DSU.



Even the proceedings under Art 21.5 goes through panel review and appellate review but the scope of review is only limited to the question of whether the responding Member has complied with the DSB recommendations or not.



Then the compliance proceedings report(s) are also adopted by the DSB.

Remedies in event of non-compliance

- If it is found that the responding Member has not complied with the DSB recommendations, there are two options:
 - Temporary measures like compensation
 - Retaliatory measures
- Compensation is rarely invoked but retaliation is frequently invoked.
- The possibility of retaliation makes WTO DSS a robust one.

Retaliation

- After the expiry of RPT, and no compensation is agreed, then the complaining Member can seek authorisation from the DSB to impose counter measures on the responding Member.
- These countermeasures are called as retaliatory measures.
- DSU explicitly says that retaliation should be used as a measure of last resort and should be temporary.
- DSU provides that the objective of retaliation should be only to induce compliance and not as punitive measures.
- If responding Member comes into compliance, retaliatory measures should be revoked.

Suspension of Concessions or Other Obligations

- When the complaining Member takes a retaliatory measure, there are certain requirements prescribed in the DSU itself.
- The level of suspension of concessions or other obligations should be equivalent to nullification and impairment.
- So both qualitatively and quantitatively.
- First the complaining Member should try to suspend the obligations in the same sector and within the same agreement.
- If that is not possible, then different sector but within the same agreement.
- If that is not possible, suspension under different agreement can be explored.
- Cracking the code for retaliation- LDCs and developing countries take retaliation under TRIPS

Alternatives to adjudication under the DSU



MAS



ART 5 OF THE DSU- GOOD
OFFICES, CONCILIATION
AND MEDIATION



ART 25 OF THE DSU-
ARBITRATION

Any Questions?



AB crisis

- Impediments in the appointment of AB Members
- Impediments in the reappointment of AB Members





Thank You for your patient hearing!