

DSU Procedures

Consultations

(Negotiations phase -
this comes originally from Art. XXIII)

- 2 steps (Art. 4)
- 1) seek consultations first, if these fail then ask for a panel (Art. 4.7)
 - 2) Parties can seek Good Offices, Mediation (Art. 5)

[Not really used in the new system. In July 2001, the WTO DG urged Members to consider using them.]

Panel Process

(Adjudication)

As of 2002 - proceedings not open to public but Members get to specify their delegation (to include lawyers — As decision in Bananas)

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- Establish panel (Art. 6)
(get it on agenda of the DSB)
 - Selection of panel (Art. 8)
 - Establish terms of reference (Art. 7)
 - Panel procedures (Art. 15 & Appendix 3)
 - Consideration/Adoption of report (Art. 16)

Appeals process

(Appellate review)
(Art. 17)

[Heavy use of appellate review — as of 9/2001 a little over 2/3s of the cases had been appealed (p.265)]

- Another panel but parties are chosen from a standing group of seven

AB panels sit in groups of 3 but all 7 review each case

[Appellate Body members are now from Brazil, Australia, EC, U.S., Japan, Egypt, India appointed for 4 year terms, the first 3 were appointed 2001, the others earlier]

AB panels limited to legal issues raised and they have rules of procedure

- There is no concept of stare decisis — but AB has said that adopted GATT panel reports created “legitimate expectations” that (p.265) similar matters would be treated similarly
 - Heavy reliance on textual interpretation
 - Jackson says there is no evidence that AB is more deferential to members than panels “while it has significantly cut back on the scope of panel rulings in some cases, it has significantly expanded the scope of liability in others.”

Implementation

- DSU makes the DSB responsible for monitoring whether/how a defendant is supposed to comply Art. 21

Losing party is supposed to indicate what actions it plans to take to implement — if immediate implementation is impossible, then Art. 21.3 implementation is required within a “reasonable time”

[The preference for withdrawal is noted elsewhere in the WTO Agreement, See Art. XVI:4, “each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”]

(Jackson notes that there is an international law obligation to implement recommendations to withdraw)

There is a clear priority of responses

- 1) withdraw or correct the offending measure (in a reasonable period of time, not to exceed 15 months; range of 8-10 months is average)
- 2) compensation (only if withdrawal is impracticable; as a temporary measure) Art. 22
- 3) withdrawal of concessions as a response (only if authorized by DSB) Art. 22

The losing party cannot block the authorization — there would have to be the negative consensus — and there can be arbitration over the level of suspension if the parties do not agree

[In the big cases to date that has occurred — members have presented very different views about how to measure]