

WTO dispute settlement (The DSU Process)

- **WTO Dispute Settlement:**
 - The **dispute/controversy settlement mechanism is one of the strengths of the WTO system.**
 - While **under international law** states can **only be judged by a tribunal if they have previously accepted its jurisdiction**, when a dispute arises on the interpretation/application of one of the WTO agreements, **member countries cannot refuse to submit to the automatic and compulsory procedure** provided for by the **Dispute Settlement Understanding (DSU)** signed in the Uruguay Round.
 - The dispute settlement process is deemed so efficient that since 1995, 621 disputes have been brought to the WTO and over 350 rulings have been issued.
 - The **DSU** dwells on **GATT's** Article XXII and Article XXIII.
 - **Article XXII:** provides for **preliminary consultations among the Parties.**
 - In **national law**, I can only go to a judge/start a procedure if I can tell which of my rights have been violated.
 - In point b of **Article XXII**, you don't need to have a violation to start a procedure "the application by another contracting party of any measure, **whether or not it conflicts with the provisions of this Agreement.**"
 - If one of the **benefits of the agreement** is being "damaged" by a measure taken by another country, even if the measure is not violating the agreement, I **can start a controversy.**
 - Non violation complaints:** if a measure which is perfectly legal happens to break the balance between the trade concessions granted by Members **in a way that couldn't have been anticipated at negotiations time**, the system offers the means to bring back Members' opposing interests to equilibrium.
 - **Article XXIII:** if a mutually agreed solution is not reached, the dispute is submitted to the Contracting Parties (countries that signed the GATT agreement). It also sets the **prerequisites for filing a case.**
 - Non violation complaints reveal the true function of the WTO system: its final **goal is not to impose Members to abide with strict rules under the threat of sanctions** but to **provide them with a means capable of keeping the balance** among their reciprocal trade relationships as set in the negotiation rounds.

- The dispute resolution system has been greatly improved during the Uruguay Round, with the introduction of:
 - An articulated **timeframe** for all the steps of the procedure
 - **9 months** from the **establishment of the panel** or **12 months** if the report of the panel is **appealed**.
 - Dispute has 3 phases:**
 - **Consultation** phase
 - **Appealing phase** (optional): how/what rules have been applied?
 - **Implementation of the reports**
 - **A second instance of judgment** with a permanent Appellate Body.
 - Not only a panel nominated by the Contracting Parties. We can appeal the decision made by the panel with the help of a second instance.
 - The shift from «consensus» to a «**negative consensus**» rule for the decisions to establish panels and to adopt the reports.
 - How are decisions taken in the WTO? By consensus, deliberations are not put to vote, but countries are asked to adopt deliberations by consensus (if countries don't oppose to the deliberation, the deliberation will be applied).
 - Is it possible to reach consensus in a dispute between two countries? It is very hard. If I want to apply a report made by the panel using consensus, I must take into consideration that the looser party will oppose, consensus will never be reached.
 - Non consensus: there will always be one party that will want to apply the decision taken by the panel (the winner party). Therefore, decision taken by the panel will be automatically binding.
 - A new phase for the **multilateral surveillance of the implementation of the reports**.
 - **Phase before the Panel:**
 - The terms of reference of the Panel state that it shall **examine the issue referred to the DSB by the complainant in the light of the applicable agreements** to make such findings that will assist the **DSB in making its final recommendations and rulings** (Article 7).
 - The procedure before the Panel resembles that before a national court. Parties can file **written submissions** and there are usually at least two meetings for the **oral discussion** of the case. Each party holds the **burden to prove** their claims. Private lawyers can be included in the delegation of each party.
 - After the hearing of the parties, the Panel releases **an interim report** on the facts and the parties can submit their comments.
 - DSB: is composed by the representatives/diplomatic of each country.

- **Possible content of the report:**
 - If the Panel (or AB) finds that **a rule has been violated, nullification or impairment** of the complainant's rights **will be presumed, otherwise the complainant will have to prove them.**
 - The Panel/AB will recommend to bring the contested measure into conformity with the violated rules (could make suggestions on how to do so).
 - No award of damages** is possible.
 - The final report is then referred to the DSB for adoption, which takes place within 60 days **unless all WTO Members object** (negative consensus).
- **Implementation phase:**
 - The DSU provides for the DSB to be entrusted with the surveillance of the implementation of the reports until the dispute is definitively settled among the Parties (**the case is automatically on the agenda of the DSB from its second meeting following the report's adoption on**).
 - The **final settlement** may happen only in two ways:
 - a. The stipulation of a definitive agreement through which the Parties put an end to the dispute.
 - b. The implementation of the reports of the panel and- if an appeal has been proposed – of the Appellate Body
- Chapter 5, questions (page 9)
 - Compare the dispute settlement procedures under the GATT and the WTO. What are the major differences? What is the nature of WTO dispute settlement: is it judicial, political, or more like arbitration?
 - They differ on how deliberations are taken. Reverse consensus in WTO (that makes the final decision automatically binding). Existence of a second instance WTO. Timeframe and implementation frame.
 - WTO less political, more ruled based.
 - What are the major stages in WTO dispute settlement? Do you see parallels in any of the stages to domestic legal proceedings with which you are more familiar?
 - i) Consultation, ii) panel, iii) appeal, iv) implementation of the report.
 - Comparison/similarities to the Italian law: appeal phase and panel. Not all legal systems have a consultation phase (the Italian does). Last phase could be thought as damages awarded by the court. But mostly phase 2 and 3.
 - Why do you think consultations are required before a panel request?
 - Things might be very complex, it is a good way to force the parties to make things clear.
 - Hope that solution might be found, avoiding time, expenses...
 - Parties might interrupt the proceeding if they reach a solution.

- According to what decision-making rule are panels established? What about the adoption of panel or AB reports?
-Non consensus rule also used to establish panels.
- Why do you think WTO Members created a strong dispute settlement system in the Uruguay Round? Does it seem contradictory to you that adoption of panel and AB reports is automatic in the absence of unanimous objection from members but that changes to the substantive WTO rules require positive unanimity? Consider the following analysis from Pauwelyn:
-Difference in power between countries.

WTO dispute settlement (What enforcement for Panels and AB rulings)

- **Non implementation of the reports:**
 - The loser country within **30 days** should communicate how it intends to implement the decision. It can also ask for a «**reasonable**» **period of time**, which is either convened between the Parties in a time no longer than **15 months** or set through an arbitration (Article 21.3).
 - If the loser refuses to implement an adopted report: Article 22 provides for two different measures (**temporary**, till the dispute is finally settled):
 - A **compensation agreement** reached by the Parties.
 - The **unilateral suspension of concessions** on the part of the winning Party (WTO created to avoid unilateral measure. We find unilateral suspensions here because they are temporary and because they are taken and applied under a **multilateral control**. Just to unify damage created by the no implementation of the report). It is important to stress that this takes place with all the guarantees offered by a multilateral procedure.
- **Implementation phase:**
 - **Temporary Measures:**
 - A **compensation agreement**.
It is not a final agreement settling the dispute. But it avoids that the winning party continues to suffer damages.
 - The **suspension of concessions or other obligations** (unilateral counter measures)
Characteristics: i) **Previously authorized**, ii) **proportional to the damage**, iii) **submit it to arbitration**
 1. The countermeasure has to be previously **authorized** by the DSB.
 2. It must **comply with** the conditions set out in Article 22., first of all its amount must not exceed what is necessary to offset the damage.
 3. If the amount of the measure is contested, the dispute is settled through an **arbitration**.

It is this **guarantee of multilateral control over the procedure** that is one of the major strengths of the WTO DS mechanism.
 - **End of dispute:**
 - A mutually agreed solution
 - The implementation of the recommendations (report) to bring a measure into conformity with the covered agreements.

- **The crisis of the WTO Dispute resolution system**
 - The Trump Administration has expressed a clear position against multilateralism.
 - This has taken, among other forms, that of a sort of «boycott» of the WTO, whose worst display was the refusal to allow the nomination of new judges of the Appellate Body.
 - In December 2019, with the expiring mandate of two members, only one judge remained in office, since then the second instance of judgment is no longer granted.
 - This impasse comes in a moment when WTO Members are discussing a reform of the whole dispute settlement system.
 - The **USA refused** to participate to the **election of new judges**. When the **number of judges was under 3**, the **crisis began** for real.
- **Article 25 of the DSU**
 - We don't have the appealing body anymore, but we still have a panel. We don't have the appealing body in fact, but theoretically we still do. So, some countries started notifying to the panel their willingness to appeal the decision taken by the panel. So, a solution within the frame found by the EU, was **article 25 of the DSU**.
 - **Set up an arbitration system** to perform the function of the appealing body in a **temporary way (MPIA)**.
 - Help the WTO survive, not to change its "origins".

WTO dispute settlement (The Status of WTO Agreements in EU Law)

- **The Status of WTO Agreements in EU Law**
 - Can private firms take advantage of the provisions of WTO treaties?
 - Can they appeal to GATT Articles before national courts and tribunals?
 - Or, in other words, can WTO treaties produce.
- In the European Union the European Court of Justice (ECJ) has answered to these questions in the negative.
- Since the International *Fruit case* (Firms where only allowed to import a certain quote. They thought that since the EU is part of the GATT which bans restrictions, their rights were being violated) in 1972 the Court has affirmed that the GATT lacks prescriptive force and that it is mainly directed at promoting agreed solutions between the Parties in case of disputes.
- ECJ's jurisprudence hasn't changed even after the profound reform of the multilateral system in 1995:
 - Despite the reinforcement of the normative character of the obligations contained in WTO trade treaties their direct effect is still denied by the ECJ (Portugal v. Council, 1999, Van Parys, 2005).
 - "it is settled case-law (...) that, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions".
 - With **two exceptions**: « It is only where the Community has intended to **implement a particular obligation assumed in the context of the WTO**, or where the **Community measure refers expressly to the precise provisions of the WTO agreements**, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules" (Van Parys, 2005).
 - **This denial of direct effect is basically due to political reasons**:
"(...) as the Court held in paragraphs 43 and 46 of its judgment in Portugal v. Council, to accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules **would deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial partners enjoy**. It is not in dispute that some of the contracting parties, which are amongst the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules" (Van Parys, par. 53).