Chapter V

MACHINERY OF WTO DISPUTE SETTLEMENT

Introduction

The main function of the WTO’s work is dispute settlement. Trade relations often involves conflicting interests. A healthy way to settle these conflicts is through some neutral procedure based on the some sound and agreed legal base. This is the purpose behind the Dispute Settlement Process envisaged in the WTO agreements. The WTO dispute settlement machinery functions almost like a “Court of International Trade”. It has compulsory jurisdiction. Disputes are settled largely with the help of rules of law, decisions are binding on the parties. Sanctions may be imposed if decisions are not complied with.

This part of the chapter examines the roles of Dispute Settlement Body the Panel and the Appellate Body.

The machinery involved in the system of dispute settlement in the WTO are,

(i) Dispute Settlement Body (political institutions)
(ii) Dispute Settlement Panels (independent judicial type institutions).
(iii) Standing Appellate Body.
(iv) Other Bodies and Persons involved in WTO Dispute settlement.

The WTO entrusts the adjudication of disputes at the first instance to panels and at the appellate level to the standing Appellate Body.
5.1 Dispute Settlement Body

The WTO Dispute Settlement System is administered by the Dispute Settlement Body (DSB)¹. The General Council discharges its responsibilities under the DSU through the DSB. Article IV.3 of the WTO Agreement states, the General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement understanding. The Dispute Settlement Body may have its own Chairman and shall establish such rules of procedure as it deems necessary for the fulfillment of those responsibilities. Thus the DSB has the authority to establish panel, adopt panel, and Appellate Body Reports, maintain surveillance of implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements.²

DSB is composed of Ambassador-level diplomats of all WTO Members.³

With respect to functions of the DSB, Article 2:1 of the DSU broadly defines these functions as the administration of the dispute settlement system.

The administration of the dispute settlement system, however, is not limited to these functions. It includes the appointment of the

¹ See Article 2.1 of the DSU.
² Abid (Article 2.1 of the DSU)
³ See Article IV.2 of the WTO Agreement. Where the DSB admissers the dispute settlement provisions of a WTO plurilateral trade agreement, only those WTO Members that are parties to that agreement may participate in the decision making process or action taken by the DSB with respect to that dispute. See also Article 2.1 of the DSU.
Members of the Appellate Body\textsuperscript{4} and the adoption of the Rules of conduct for WTO dispute settlement.\textsuperscript{5}

The DSB meets as often as is necessary to adhere to the time-frames provided for the DSU\textsuperscript{6}. In practice, the DSB usually has one regular meeting per month. When the Members so request, the Director General convenes additional special meetings. The staff of the WTO Secretariat provides administrative support for the DSB.\textsuperscript{7}

\textbf{5.1.1 Decision making in the DSB}

The general rule is that the DSB takes decisions by consensus.\textsuperscript{8} Foot note 1 to Article 2.4 of the DSU defines consensus as being achieved if no WTO Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

This means that a delegation wishing to block a decision is obliged to be present, and be alert at the meeting, and when the moment comes, it must raise its flag and voice opposition. Any member that does so, even alone, is able to prevent the decision.

However, when the DSB establishes panels, adopts panel and Appellate Body Reports, and when it authorizes retaliation, the

\textsuperscript{4} Article 17.2 of the DSU states the appointment of Appellate Body Member and their terms of office.

\textsuperscript{5} WT/DSB/RC/1 dated 11 December 1996.

\textsuperscript{6} Article 2.3 of the DSU.

\textsuperscript{7} Article 27.1 of the DSU.

\textsuperscript{8} See Article 2.4 of the DSU.
DSB must approve the decision unless there is consensus against it. This special decision making procedure is commonly referred to as ‘negative’ or ‘reverse consensus’.

No member (including affected or interested parties) is excluded from participation in the decision making process. The important stages of the dispute settlement process are establishment, adoption and retaliation. At these stages the DSB must automatically decide to take the action ahead, unless there is a consensus not to do so.

### 5.1.2 Role of the Chairperson

Even though the General Council of the WTO acts as the DSB, the DSB should have its own Chairperson, who is usually one of the Geneva based Ambassadors. The Chairperson is appointed by a consensus decision of the WTO Members. The chairperson of the DSB has mainly procedural functions i.e., passing information to the Members, chairing the meeting, calling up and introducing the items in the agenda, giving the floor to delegations wishing to speak, proposing and, if taken, announcing the requested decision. The chairperson of the DSB is also the addressee of the Members’ communication to the DSB. In addition, the chairperson has several responsibilities in specific situations.

### 5.2 Dispute Settlement Panels of WTO

Panels are quasi-judicial bodies. In a sense they are tribunals in charge of adjudicating disputes between Members in the first instance. They are normally composed of three and in

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9 See Article 6.1; 16.4; 17.14 and 22.6 of the DSU.
exceptional cases five experts selected on an ad-hoc basis. This means, there is no permanent panel at the WTO. Any one who is well qualified and independent\textsuperscript{10} can serve as a panelist. The WTO Secretariat maintains an indicative list of names of governmental and nongovernmental persons, from which panelists may be drawn.\textsuperscript{11} Whoever is appointed as a panelist serves independently and in an individual capacity and not as a government representative or as a representative of any organisation.\textsuperscript{12}

The actual adjudication of disputes brought to the WTO is carried out as first step by an adhoc Dispute Settlement Panel. In order to initialize the adjudication process several stages have to be passed through, such as,

- Panel request.
- Establishment of a Panel
- Composition of panel
- Terms of reference of the panel
- Standard of review applied by panels.
- The exercise of judicial economy by panel.
- Characteristics of panel report; and
- The role of the WTO secretariat

\textbf{5.2.1 Request for the establishment of a panel}

\textsuperscript{10} Articles 8.1 and 8.2 of the DSU.

\textsuperscript{11} See Article 8.4 of the DSU.

\textsuperscript{12} See Article 8.9 of the DSU.
The complainant must request the DSB to establish a panel. Pursuant to Article 6.2 of the DSU, the request for the establishment of a panel, also referred to as the panel request, must be made in writing and must:

- indicate whether consultations were held\(^{13}\)
- identify the specific measures at issue; and
- provide a brief summary of legal basis of the complaint sufficient to present the problem clearly.\(^{14}\)

**In EC-Banana III case.** The Appellate Body found that:

“It is important that a panel request be sufficiently precise for two reasons; first it often forms the basis of the terms of reference of the panel pursuant to Article 7 of the DSU, and second, it informs the defending party and the third parties of the legal basis of the complainant.\(^{15}\)

The Appellate Body also held that a failure to make a claim in the panel request cannot be subsequently “cured” by a complaining party’s argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.\(^{16}\)

**Appellate Body in Mexico – Corn Syrup (Article 21.5 – US) held**

\(^{13}\) See Article 4.2 of the DSU.

\(^{14}\) Article 6.2 of the DSU, Note that Article 6.2 of the DSU also applies to request for the establishment of a panel under Article 21.5 of the DSU, but it needs to be interpreted in the light thereof, and as a result its requirements need to be adopted to compliance proceedings.

\(^{15}\) Appellate Body Report, EC-Banana III, Para 142;

\(^{16}\) Appellate Body Report, EC-Banana III, Para 143.
“The purpose of the requirement seem to be primarily informational—to uniform the DSB and Members as to whether consultation took place. We also recall that the DSU expressly contemplates that, in certain circumstances, a panel can deal with and dispose of the matter referred to it even if no consultation took place. Similarly, the authority of the panel cannot be invalidated by the absence, in the request for establishment of the panel, of an indication, ‘whether consultations were held’. Indeed it would be curious if the requirements in Article 6.2 to inform the DSB whether consultations were held was accorded more importance in the dispute settlement process than the requirements actually to hold those consultations.  

An example of a straightforward application of Article 6.2 of the DSU is provided by **US-Hot Rolled Steel**. The panel in this case held that the Japan’s failure to make a claim in its panel request. Challenging ‘general (US) practice’ regarding safeguards, meant that the claim was not within the panel’s terms of reference. Another example is **US-Carbon steel**, where the Appellate Body upheld the panel’s conclusions that the European Committees’ panel request referring to certain aspects of the (US) sunset review procedure as well as US statutory and regulatory provisions related to sunset reviews was not sufficient to indicate the specific measures at issue, namely matters relating to the submission of evidence in a sunset review. 

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17 Appellate Body Report Mexic Corn Syrup (Article 21.5-US) Para 70
Whether or not the ‘specific measure’ at issue is sufficiently identified in the panel request depends on the ability of the respondent to defend itself, given the actual reference to the measures at issue.\textsuperscript{20} In \textit{Canada-Wheat Exports and Grain Imports}, the Panel distinguished between particular actions and measures of the general application and noted that whether a measure of general application is sufficiently identified.

The Panel went on to articulate a legal proposition that

“the fact that a Panel request does not specify by name, date of adoption etc. the relevant law, regulation or other legal instruments to which a claim relates does not necessarily render the panel request inconsistent with Article 6.2, provided that the panel request contains sufficient information that effectively identifies the precious measure at issue”.\textsuperscript{21}


\textsuperscript{21} Panel Report; Canada-Exports and Grain Imports, para 6.10 point 36. Accordingly the Panel allows Canada’s challenge in respect of one of the claims of the United States and dismissed two others. See also in this respect, Appellate Body Report US-Oil country Tubular goods Sunset Review, Paras 173-3 advising complainants to be specific about their ‘as such’ challenges to
In a few cases, the question arises whether the requirement of the Article 6.2 to ‘identify the specific measures at issue’ also means that the ‘specific products at issue’ must be identified in the panel request. The Appellate Body noted in EC-Computer Equipment that,

‘measures’ within the meaning of Article 6.2 of the DSU... also can be the application of tariffs by customs authorities.22

Article 6.2 of the DSU does not explicitly require the products, to which the ‘specific measures at issue’ apply, be illustrated. However, with respect to certain WTO obligations, in order to identify “the specific measures at issue”, it may also be necessary to identify the products subject to the measures in dispute.23

**Recent finding of the Appellate Body in EC-Chicken cuts**

**(i) Identification of the product at issue**

Article 6.2 of the DSU does not refer to the identification of the specific measures at issue. Article 6.2 contemplates that the identification of the products at issue must follow from the specific measures identified in the panel request. Therefore, the identification of the products at issue is generally not a separate and distinct element of panel terms of reference, rather it is a

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23 Ibid para 67.
consequence of the scope of applications of the specific measures at issue. In other words, it is a ‘measure’ at issue that generally will define the product at issue.24

(ii) Panel request must provide brief summary of the Legal basis of the Complaint sufficient to present the problem clearly

The Appellate Body noted that the DSU demands only a brief summary of the legal basis of the complaint.25 The summary must, however, be one sufficient to present the problem cleanly.26 The claims but not the arguments27 must all be specified sufficiently in the Panel request.28 In EC-Bananas III, the Appellate Body found that, in view of the particular circumstances of that case, the listing of articles of the agreements alleged to have been breached satisfied the minimum requirements of Article 6.2 of the DSU.29 In Korea-

24 Appellate Body Report EC-Chicken cuts, para 165. Note, however, in some instances the products covered in a panel request can have the effect of potentially qualifying the scope of substantive measures before the panel; for example Panel Report, Diminican Republic-Import and sale of Cigarettes, paras 7.94-7.103.

25 See Appellate Body Report Korea- Dairy, Para 120.

26 Ibid. (Para 120).

27 The arguments are setout and progressively classified in the written submissions to the panel and the panel meetings.

28 See Appellate Body Report, EC-Bananas III, Para 143; Note that the Appellate Body Rules in EC-Tariff preferences that in the particular circumstances of that clause a complaining party challenging a measure taken pursuant to the enabling must allege more than mere inconsistency with Article 1:1 of the GATT 1994; for to do only that would not convey the “legal basis of the complaint sufficient to present the problem clearly. See Appellate Body Report EC-Tariff Preferences, para 110.

29 See Appellate Body Report, EC-Bananas III, Para 141.
**Dairy**, however, the Appellate Body noted that, where the Articles listed establish not one single, distinct, obligation but, rather, multiple obligations, the listing of articles of an agreement in and of and itself, may fall short of the standard of Article 6.2 of the DSU.\(^{30}\) The Appellate Body held that the question of whether the mere listing of the articles sufficient must be examined on a case-by-case basis. Furthermore, it ruled that, in resolving that question,

“We take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated.”\(^{31}\)

The Appellate Body thus set forth the standard of the ability of the respondent to defend itself. In **EC-Tube or Pipe fitting** the Panel examined whether the respondent’s ability to defend itself

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\(^{30}\) See Appellate Body Report, Korea-Diry, Para 129. See also Panel Report Thailand-H.Beans para 7.18 and 7.27 and Panel Report US-Certain EC products (Article 21.5-EC) para 7.50. The Panel in Korea various Measures on Beef, held, that the mere listing of articles may suffice to cover other provisions or annexures not expressly mentioned in the request, if in the nature of the legal determination of the issues covered by the enumerated provisions would be ‘inextricable linked’ to a consideration of consistencies under such other provisions or annexures. See Panel Report, various measures on Beef, paras 8.13-15, upheld in Appellate Body Report, Korea-various measures on Beef, paras, 76-89. See also Panel Report, Egyp-Steel Refar, para 7.29; and Panel Report, EC-Trade Marks and Geographical indicators (Australia), paras 7.32-7.34. For decisions that found a claim in the panel request not to be integrally linked on not related in any self-evident way with author provisions that was argued only in the written submissions. See Panel Report, US-Line Pipe, Paras, 7.116-7.126 and Panel Report, Egypt-Steel Refar, Para, 7.31.

\(^{31}\) Appellate Body Report, Korea, Dairy, Para-127.
was prejudiced by an alleged lack of specificity in the text of the Panel request. The Panel found that it was evident from the participation of European communities in arresting its view in various phases of the Panel proceedings that the ability of the European communities to defend itself had not been prejudiced over the course of the proceedings.  

The Appellate Body ruled in US-Carbon Steel that in considering the sufficiency of a Panel request, submission and statements made during the course of the Panel proceedings may be consulted in order to confirm the meaning of the words used in the Panel request.  

In Mexico-Antidumping Measures on rice

The Panel held that the listing of provisions allegedly violated had to be taken ‘together with the narrative’ that accompanied the test, in order to determine whether the request was sufficient to present the problem clearly to the responding Members.  

However, it should be emphasised as the Appellate Body ruled in EC-Banana III and already discussed above that a Panel request cannot be ‘cured’ by a complaining party’s argumentation in subsequent submissions.  

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34 See Panel Report, Mexico – Anti-Dumping Measures on Rice para 7.30 for a case where even when read with the narrative, the mere listing was not sufficient to identify the problem. See Panel Report, Japan-DRAMs (Korea), Para 7.21.  
35 See the Panels Ruling in Japan –DRAMs (Korea) which stated that consideration of an actual prejudice suffered during the Panel process undermines the due process objective. Since it allows a Member to correct
Panel in US-FSC (Article 21.5-EC II) rules that\textsuperscript{36}

In assessing whether the United States may be prejudiced by any apparent defects in the EC’s panel request, we consider whether the EC panel request identified the measures with sufficient clarity to allow the United States to defend itself. In this regard, we are mindful that defects in a panel request cannot be ‘cured’ in a subsequent submission of a complainant during a panel proceeding. Nevertheless, a complainant’s first written submission may confirm the meaning of the word used in the panel request.

\textbf{5.2.2 Panel Establishment}

Request for establishment of a panel initiates the phase of adjudication. A request for the establishment of a panel must be made in writing and is addressed to the chairman of the DSB. This request becomes an official document in the dispute in question and is circulated to the entire WTO Members. The request for the establishment of a panel first appeared as an item on the agenda of the DSB. At this stage the panel is established unless the DSB decides by consensus not to establish a panel.\textsuperscript{37} (reverse consensus)

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any lack of clarity in its request during the panel proceedings, eventhough the request may not have been sufficiently clear for the respondent to being preparing its defence at the beginning of the panel process, Panel Report, Japan-DRAMS (Korea), Para 7.9.
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\textsuperscript{37} Article 6.1 of the DSU; Note that Japan and the EC have proposed that a panel be established by reverse consensus of the meeting at which the panel request first appears on the DSB’s agenda. The Chairman’s Text of May 2003 included this proposal, with the qualification that, where, a case against a
The rule of negative (or reverse) consensus means that the complainant ultimately has a guarantee that the requested panel will be established, if it so wishes. The only possibility to prevent the establishment is a consensus in the DSB against establishment, but this will not happen as long as the complainant is unwilling to join in that consensus. In other words, as long as the complainant, even alone and against the opposition of all other WTO Members, insists on the establishment of the Panel, it is impossible for the DSB to reach a consensus against establishment of the panel.

Reverse consensus is unlikely; the establishment of a panel by DSB is 'quasi-automatic'. A panel can be and occasionally is, established at the first DSB meeting at which the panel request is considered. At this meeting, the establishment of the panel requires a normal consensus decision of the DSB. Thus, the panel can be established at the first DSB meeting, if the respondent does not object to its establishment.

The decisions of DSB on the establishment of a panel are usually preceded by short statements by parties to the dispute setting forth their respective positions. Decision to establish a panel very seldom gives rise to much debate within the DSB. Immediately after the DSB’s decision to establish the panel (or developing country Member is concerned, the establishment will be postponed if the developing country Member so requests. See the amended version of the Chairman’s text in the annex to special session of the Dispute settlement Body Report by the chairman to the Trade Negotiations committee TN/DS/9, dated 6 June 2003.
within 10 days of the decision), other Members may notify their interest in the dispute and reverse their third party rights.\textsuperscript{38}

Where more than one Member requests the establishment of a panel related to the same matter, Article 9.1 of the DSU states that,

“a single panel may be established to examine these complaints taking into account the rights of all Members concerned.

\textit{Note}, however, that the panel \textbf{in India-Patents (EC) observed} in this regard that Article 9.1 of the DSU is not intended to limit the rights of WTO Members, one of which is the freedom to determine whether and when to pursue a complaint under the DSU.\textsuperscript{39}

\textbf{In US-Steel safeguards}, the DSB at first establishment multiple panels to hear and decide similar complaints by European communities, Japan, Korea and China, Switzerland, Norway, Newzealand and Brazil. Subsequently the United States and the complainants reached an agreement on the establishment of a single panel, under Article 9.1, to hear the matter at issue. The

\textsuperscript{38} See Art. 10.2 of the DSU.

\textsuperscript{39} Panel Report India – Patients (EC) para 7.15. In this case the European Committees, which had been a third party to the dispute in India-patients (US) brought a complaint on the same matter after the panel Report was issued. India argued that this was in violation of Article 9.1 of the DSU, which it viewed as imposing on both the WTO and its membership a duty to submit multiple complaints to a single panel wherever feasible, the Panel point out that recommendary, not mandatory. It held, ‘Article 9.1 is clearly a code of conduct for the DSB because its provisions, pertain to the establishment of a panel, the authority for which is exclusively reserved for the DSB. As such Article 9.1 should not affect outstantive and procedural rights and obligations of invidual Members under DSU, Panel Report India-Patents (EC) para 7.14.
United States, however, requested that the Panel issue eight separate reports rather than one single report. On the basis of Article 9.2, which explicitly provides for the right of the parties to have separate reports, the Panel decided to issue its Reports in the form of one document constituting eight panel reports with a common cover page and common descriptive parts.

See in US-Offset Act (Byrd Amendment)

Conceiving complaints by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, the Appellate Body upheld the Panel’s refusal to issue at the request of the United States, a separate report for the complaint brought by Mexico, because the United States filed that request too late.

Article 9.3 of the DSU requires – to the extent possible – that the same persons can serve as the Panelists on each of the separate panels and that the time table for his panel process in such disputes shall be harmonized. This was done in EC-Hormones and US-1916 Act.

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40 The United States argued that by doing so it wanted a protect its right under the DSU, including the right to seek. A solution with one or more of the complainants without adoption of a report or without an appeal.

41 Separate panel Report were also issued as a single document. In Ec-Approval and Marking of Biotech products and Canada-wheat Exports and grain imports, separate Panel Reports were issued in different documents in, for example EC-chicken cuts-EC-Trademarks and Geographical Indications, EC-Export subsidies on sugar and EC-Bananas III.

The DSU does not deal with situations that could involve multiple respondents. Therefore, a Member is free to decide which member to challenge before the dispute settlement system even if the measure at issue has been imposed by several Members or several members bear some responsibility for the measure at issue.43

Another situation not provided for in the DSU in the situation in which a Member files second panel request on the same matter to clarify and or extend the scope of its first panel request. This happened, for example in Canada-Wheat Export and Grain Imports and EC and contain Member States – Large Civil Air Craft. In both cases the United States filed a second panel request. In Canada-Wheat Exports and Grain Imports, it was decided that the panelists that composed the panel established pursuant to the first panel request would also compose the panel established pursuant to the second panel request, and that the proceedings of both panels would be harmonized pursuant to Art 9.3 of the DSU.44

**In EC and certain Member States – Large Civil Air Craft**, only one panel was established.

### 3. Composition of Panel

As per Article 8.5 of the DSU, Panels are normally composed of three persons. The parties to the dispute can agree, within 10 days of the establishment of the panel, to a panel composed of 5 panelists. However, to date this has never occurred.

44 See Panel Reports, Canada-Wheat Export and Grain Imports paras 1.11-1.12.
Pursuant to Article 8.1 of the DSU panels must be composed of well qualified Governmental and / or non-governmental individuals. By way of guidance the DSU indicates that these individual can be:

“persons who have served on or presented a case to a panel, served as representative of a Member or of a contracting party to GATT 1947 or as a representative to the council or committee of any covered agreement or its predecessor agreement, or in the secretariat, taught or published on international trade law or policy or served as senior trade policy official of a Member.45

Article 8.2 of the DSU stipulates that the panelists should be selected with a view to ensuring their independence providing a sufficiently diverse background and a wide spectrum of experience. Nationals of Members that are parties or third parties to the dispute shall not serve on a panel concerned with that dispute unless the parties to the dispute agree otherwise46 while this is not common; in some cases parties have agreed on a panelist who is a national of one of the parties.47

‘When’ a dispute occurs between a Developing Country Member and a Developed Country Member, the panel shall, if the

45 Article 8.1 of the DSU.
46 See Article 8.2 of the DSU. As the European committees and the United States are involved in many cases, either as parties or as third parties, their nationals does not often serve as panelists.
47 In US-Zeroing (EC), a dispute between the European Committees and the United States, the Panel included William Davery from the US and Hans-Friedrich Beseler from Germany.
Developing Country Member so requests include at least one panelist from a Developing Country Member.48

In many panels dealing with disputes involving a Developing Country Member, at least one of the panelists has indeed been a national of a Developing Country Member.

Panelists are predominantly current or retired government trade officials with a background in law. Many among them are Geneva-based developments of WTO Members. The DSU explicitly provides that panelists shall serve in their individual capacities and not as government representatives. In recent years there has been an increase in the number of academics and legal practitioners serving as panelists. It is also significant that at least half of the panelists have already served on a GATT or WTO panel before. In other words, many panelists serve more than once as panelist.49

To assist the selection of panelists, the secretariat maintains a list of governmental and non-governmental individuals possessing the required qualifications to serve as panelists.50

Members periodically suggest names of individuals for inclusion on this list, and those names are added to list upon approval by the DSB. However, the list is mere ‘indicative’ and individuals not included in this list may be selected as panelists. In fact,

48 See Article 8.10 of the DSU.
49 For a list of all person who served as panelists to date and the panels on which they served see www, World Trade Law, net/dsc/database/panelist-country, asp, visited on 1 Dec. 2007.
50 See Article 8.4 of the DSU.
most first-time panelists were not on the list at the times of their selection.

5.2.3 DSU Reform Negotiations

The European Communities has proposed to move from the current system of ‘adhoc’ panelists to a system of permanent panelist.\textsuperscript{51} According to the European Communities, such a change will lead to faster procedures and increase the quality of the panel reports.\textsuperscript{52} While the introduction of a system of permanent panelists seems a logical next step in the evolution of the WTO dispute settlement system, the proposal of the European communities has received little support to date.

5.2.4 Terms of reference of a Panel

As per Article 7.1 of the DSU, unless the parties agree otherwise within 10 days from the date of establishment of a panel, a panel is given the following standard terms of reference.

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\footnote{Communication from the European Union, TN/DS/W/1, dated 13 March 2002 and communication from European Union TN/DS/W/38, dated 23 January 2002-03.}
\footnote{In the opinion of the European committees, there is currently a growing quantitative discrepancy between the need for panelists and the availability of qualified adhoc panelists. Not only the number of disputes much higher than under the old GATT the actual conduct of a dispute settlement procedure has become much more sophisticated than before. The workload of the panelists has substantially increased since the substance of the cases from both a factual and a legal point of view has become significantly more complex. The European committees is therefore of the view that it is necessary to introduce a system of permanent panelists. These permanent panelist would serve on panels as appointed by the Director General of random basis.}
\end{footnotesize}
“To examine in the light of the relevant provisions in the ‘particular’ covered agreement cited by the parties to the dispute, the matter referred to the DSB by the complainant/none of party-in the document... and make such finding as will rise to DSB in making the recommendation or in giving ruling provided for in that/those agreements.”

The document referred to in these standard terms of reference is the ‘panel request’. Hence a claim falls within the panels’ terms of reference, i.e., within the mandate of the panel, only if, that claim is identified in the panel request.53

**In EC-Tube or pipe Fittings**, the Panel found that Brazil’s claims under Article 6.9, 6.13, 9.3 and 12.1 of the Anti-Dumping Agreements were not within its terms of reference, as these provisions do not appear in the list of provisions in the panel request, nor are they referred to in the ensuing description of allegations in that document. As the Appellate Body stated in **Brazil-Desiccated coconut**, the terms of reference of the panel are important for two reasons.

One, the terms of reference fulfill an important due process objective—they give the parties and third parties sufficient information. Concerning the claim at issue in the dispute in order to show them an opportunity to respond to the complainant’s case, and two, they establish the jurisdiction of

53 Note that in EC and certain Member states – Large Civil Aircarft, the United State asked the DSB to decide that its claims in its second panel request be included in the terms of reference of the original panel See WT/DS 316/8 dated 15 May 2006.
the panel by defining the present claims at issue in the dispute.\textsuperscript{54}

A panel may consider only those claims that it has authority to consider under the terms of reference.\textsuperscript{55} Therefore, a panel is bound by its terms of reference.\textsuperscript{56} Within twenty days of the establishment of the panel, the parties to the dispute can agree on special terms of reference for the panel.\textsuperscript{57} However, this rarely occurs. In establishing a panel, the DSB may authorize its chairperson to draw up the terms of reference of the panel in consultation with the parties to the dispute.\textsuperscript{58} However, if no agreement on special terms of reference is reached within 20 days of the establishment of the panel; the panel shall have standard terms of reference.

In the case of a broadly phrased panel request, it may be necessary to examine the complainants’ submission closely to determine precisely which claims have been made and fall under the terms of reference of the panel.\textsuperscript{73} \textbf{As Stated by the Appellate Body in Brazil-Desiccated coconut}, the terms of reference establish the jurisdiction of a panel. With regard to the question whether a panel could decline to exercise jurisdiction which it has according to the terms of reference, the \textbf{Appellate Body in Mexico-Taxes on Soft Drinks} held:

\textsuperscript{54} Appellate Body Report, Brazil-Desiccated coconut.
\textsuperscript{55} See Appellate Body Report India- Patents (US) para 92, a panel cannot assume jurisdiction that it does not have; see Ibid.
\textsuperscript{56} See Ibid Para;
\textsuperscript{57} See Article 7.3 of the DSU.
\textsuperscript{58} See Appellate Body Report, Chile-Price Band System, para 165. However as discussed above later submissions and statements cannot cure any defects in the panel request.
A decision by a panel to decline to exercise validly established jurisdiction would seem to ‘diminish’ the right of a complaining Member to seek the redress of a violation obligations within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel’s obligation under Article 3.2 and 19.2 of the DSU. We see no reason, therefore to disagree with the panel’s statement that a WTO panel would seem ...not to be in a position to choose freely whether or not to exercise its jurisdiction.59

5.2.5 Standard of review for Panels

A panel is called upon to review the consistency of a challenged measure with WTO Law. Both the measures at issue and the relevant provisions of WTO law allegedly violated are determined by the terms of reference of the panel. But what has the standard of review of a panel to apply in reviewing the WTO containing challenged measures?

Article 11 of the DSU stipulates:

The function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective

59 Appellate Body Report, Mexico-Taxes soft Drinks, para 53. Note, however, that the Appellate Body in para 54 of the Report was careful to stress that it was not expressing any view on whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims before it. See Ibid, para 54. In view of the scope of Mexico’s Appeal it was not necessary for the Appellate Body to express a view on this issue.
assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements and make such other findings as well to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreement.

In **EC-Hormones** the Appellate Body noted that Article 11 of the DSU “articulate with great succinctness but with sufficient clarity the appropriate standard of review of panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.”

As far as fact finding is concerned, the appropriate standard is neither a de novo review of the facts or total difference to the factual findings of national authorities. One example of de novo review is that identified by the Appellate Body in US-Cotton Yarn, where it stated that

A panel must not consider evidence which did not exist at that point of time (i.e., the time that the measure of issue was taken). If a panel were to examine such evidence, the Panel would, in effect, be conducting a de novo review... In our view this would be inconsistent with the standard of Panel review under Article 11 of the DSU.

Rather, pursuant to Article 11 of the DSU, panels have to make an objective assessment of the facts. With regard to legal

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questions, i.e., the consistency or inconsistency of a Member’s measures with the specified provisions of the relevant agreement... Article 11 imposes the same standards on panels i.e., to make an objective assessment of the applicability in conformity with the relevant covered agreements.\footnote{See Appellate Body Report, Domomion Republic-Import and sole of cigarettes, para 105. Note he very unusual situation that arose in US-Shrimp. Where the United State did not context any of the claims of inconsistency made by Ecuador but the parties had not, however characterized their shared view of the substantive aspects of the dispute as a mutually agreed solution. The Panel held, given that, not withstanding their common view as to how the dispute should be resolved, the parties have not reached a mutually agreed solution which would required us only a “report”... that a solution has been rendered” We understand that our responsibility is to set forth in Article 11 DSU. It therefore preceded to make an objective assessment of the matter. See Panel Report shrimp (Equador) Para 71.-7.6.}

**In Brazil-Retreaded Tyres**, the Appellate Body ruled in paragraphs 185 of its report that an objective assessment within the meaning of Article 11, implies, among other things, that a panel must consider all the evidences presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence. According to Appellate Body **in EC-Hormones**, not every error in the appreciation or evidence can necessarily be characterized as a failure to make an objective assessment. A panel must make an egregious error in the assessment of the evidence before the Appellate Body will come to the conclusion that the panel failed to make an objective assessment of the facts. As the **Appellate Body noted in EC-Poultry**, an allegation that a Panel has failed to conduct the objective assessment of the matter before it, as required by Article 11 of
the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself.63

The party losing a case may be compelled to argue that the Panel failed to make an objective assessment.

For the Appellate Body to find that a panel has exceeded the bounds of its discretion in adjudicating the facts. Apply summarizing its earlier case law the Appellate Body ruled in US-Carbon Steel:

Article 11 requires panels to take account of the evidence put before them and forbids them to willfully disregard or distort such evidence. Nor may panels make affirmative finding that lack a basis in the evidence contained in the panel record. Provided that panel’s actions remain within these parameters, however, we have said, “it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings, and an appeal, we will not interfere lightly with a panels exercise of its direction.64

To date the Appellate Body has found that the relevant Panels have acted inconsistently with their obligations under Article 11 in, for example, US-Wheat Gluten, US-Lamb, US-Cotton Yarn, Chili-Price Band System, US-Oil Country Tubular Goods Sunset Reviews, EC-Export subsidies in sugar, US-

**Countervailing Duty investigation on DRAMS and US-Antidumping Measures on oil country tabular goods.**

However in most cases, the Appellate Body rejected the claim of the appellant that the Panel had acted inconsistently with Article 11 of the DSU.

In **US-Steel safeguard**, Appellate Body noted that a challenge under Article 11 of the DSU must not be vague or ambiguous, but must be clearly articulated and substantiated with specific arguments. A claim that a Panel failed to conduct an objective assessment of the matter is, according to the Appellate Body,

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67 See Appellate Body Report, US-Steel safeguard, para 498;
“not to be made lightly, or merely as a subsidiary argument or a claim in support of a claim or a panel’s failure to construct or apply correctly a particular provision of a covered agreement.68

A claim of inconsistency with Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.69 Most claims of inconsistency with Article 11 of the DSU are rejected by the Appellate Body.

5.2.6 The exercise of Judicial economy by Panels

Complainants used to assist several violations under various agreements. It is a well-established case law that Panels are not required to examine each and every one of the legal claims that a complainant makes. The aim of dispute settlement is to secure a positive solution to a dispute.

The Appellate Body in US-wool shirts and Blouses ruled that panels,

“need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.70

A panel has discretion to determine the claims it must address in order to dissolve the dispute between the parties effectively.71

68 Ibid.
69 Ibid.
The Appellate Body has, however, cautioned panels to be careful when exercising judicial economy. To provide only a partial resolution, a dispute may be false judicial economy since the issues that are not resolved may well give rise to a new dispute.  

As Appellate Body stated in **Australia-Salmon**, a panel has to address “those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendation and rulings in order to ensure effective resolution of disputes to the benefit of all Members.”  

Panels frequently exercise judicial economy with regard to claims before them. However, in some instances panels may decide to continue their legal analysis and make factual findings beyond those that are strictly necessary to resolve the dispute, because this may assist the Appellate Body, should it, later, be called upon to complete the analysis.  

**In 2007 in Brazil-Retreated Tyres**, the Appellate Body reminded the panel that a panel’s discretion to decline the rule on different claims of inconsistency adduced in relation explicitly for the purpose of transparency and fairness to the parties (See Appellate Body Report, Canada-Autos, para 117).  

72 The Appellate Body found that the panels have arisen in exercising Judicial economy in (for example Appellate Body Report Japan-Agricultural product II and Appellate Body Report, Australia-Salmon.  


to the same measure is limited by its duty to make findings that will allow the DSB to make sufficiently precise recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all members.\textsuperscript{75}

As long as it is clear from a Panel Report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not addressed is not inconsistent with Article 11 of the DSU.\textsuperscript{76}

There is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU.\textsuperscript{77}

If the panel’s finding relates to a claim which does fall within its terms of reference, it is not restricted to considering only those legal arguments made by the parties to the dispute.\textsuperscript{78}

\textsuperscript{75} Appellate Body Report, Brazil-Retreated tyres, para 257.
\textsuperscript{76} See Appellate Body Report, EC-Poultry, para, 257,
\textsuperscript{77} Appellate Body Report, Domanicon Republic –Import and sale of cigarettes, para 125. The Appellate Body referred in a foot note is Appellege Body Report, EC-Poultry, para 135, on this makes, see also Appellate Body Report, US-Antidumping Measures on oil country Tabular Goods, paras 131-6,
\textsuperscript{78} In this respect the rules as to burden of proof lies-In US-Wool shirts and Blouses, the Appellate Body noted, the party who assists a fact, whether the claimant or the respondent to responsible for providing proof thereof.
The Appellate Body Ruled in EC-Hormones that:

“Nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties or to develop its own legal reasoning to support its own findings and conclusion on the matter under its consideration.79

5.2.7 Characteristics of a Panel Report

A panel submits its report to the WTO stating its findings and conclusions, consistency of the measure at times in the form of a written report to the DSB. This report includes a section on the following:

- Procedural aspect of the dispute
- Factual aspect
- Claims of the parties
- Summary of the arguments (Parties and third parties)80

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80 The practice on this point came. Most panels have included a summary of the arguments drafted on the basis of an executive summary of the arguments provided by the parties and third parties. Other Panels have not included a separate section in their report summarizing the arguments but have attached the executive summaries received from the parties and third parties to the report. Some parties have attached the submissions of the parties and third parties is full to the panel report. In EC-Tube on Pipe Fittings, Brazil the complainant, requested that the complete text of its first and second written submissions, rather than its execute summaries be included in Annexes A and C to the Panel Report. The Panel rejected this request as it had been provided for in the Adhoc working procedures that the executive summary approach would be followed. See Panel Report. EC-Tubea Pipe Fittings paras 7.48 – 7.55.
• Interim review
• Panel’s findings and
• Panel’s conclusion

As required by the Article 12.7 of the DSU, a Panel Report must contain a minimum set of the findings of the fact, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations that it makes.81

In **Mexico-Corn syrup** (Article 21.5-US) the Appellate Body stated that Article 12.7 sets a minimum standard for the basic rationale with which Panels must support their findings and recommendations.82

The Appellate Body further explained:

In our view, “the duty of panels under Article 12.7 of the DSU to provide a basic rationale, reflects and conforms with principles of fundamental fairness and due process that underlie and inform the provisions of the DSU. In particular, in cases where a Member has been found to have acted inconsistently with the obligation under the covered agreement, that Member is entitled to know the reasons for such findings as a matter of due process. In addition, the requirement to set out a basic rationale, in the panel report assist such members to understand the nature of its obligations and to make informed decisions about (1) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (2) whether

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81 Note the special requirements for Panel Report, in cases where parties have reached mutually acceptable solution during the panel proceedings (See Article 12.7 of the DSU) e.g., Panel Report Japan-QOTAS and LAVER.

82 See Appellate Body Report, Mexico-Corn syrup (Article 21.5-US) para, 106.
and what to appeal. Article 12.7 also furthers the objectives expressed in Article 3.2 of the DSU of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirements to provide basic reasons contribute to other WTO Member’s understanding of the nature and scope of the rights and obligations in the covered agreements.”

In the same dispute, the Appellate Body classified: “We do not believe that it is either possible or desirable to determine, in the abstract, the minimum standard of reasoning that will constitute a basic rationale for the findings and recommendations made by a panel. Whether a panel has articulated adequately the basic rationale for its findings and recommendations must be determined on a case-by-case basis taking into account the fact of the case, the specific legal provisions at issue and the particular findings and recommendations made by a panel.”

In a dispute involving a Developing Country Member, the panel report must explicitly indicate how the panel has taken account of any special or differential treatment provision that the Developing Country Member has been involved before the panel.

In India-Quantitative restrictions, (eg) the Panel specifically referred to this requirement and noted,

“In this instance, we have noted that Article XVIII.B as a whole, on which our analysis throughout this section is based,

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83 Ibid, para 107.
embodies the principles of special and differential treatment in relation to measures taken for balance of payments purposes. This entire part G, therefore, reflects our consideration of relevant provisions on special and differential treatment, as does section XII of our report” (suggestion for implementation).85

Panelists can express a separate opinion in the panel report, be it dissenting or concurring. However, if they do, they must do so anonymously.86

Panel Reports are always circulated to WTO Members, and made available to the public, in English, French and Spanish. Reports are not circulated until all the three language versions are available. Most reports are written in English and then translated into French and Spanish. However, there have been a few panel reports written in Spanish and atleast one written in French.87

5.2.8 Role of WTO Secretariat in Assisting Panels

As per Article 27.1 of the DSU, the WTO secretariat has the responsibility of assisting panels, especially on the legal historical and procedural aspects of the matters delt with, and of providing secretarial and technical support. The legal affairs decision and the Rule Division are the main divisions of the WTO secretariat that assist dispute settlement panels.

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86 See Article 14.3 of he DSU. Note that some WTO Members have proposed that the requirement of anonymity of separate opinions should be avoided, and that each panelist must deliver a fully reasoned opinion on all issues.
87 See Panel Report, EC-Asbestos.
As per Article 27.2 of the DSU, “while the secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing community Members. To this end, the secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any Developing Country Member which so requests. This expert shall assist the Developing Country Member in a manner ensuring the continued impartiality of the secretariat. To quote, for example, a dispute concerning on SPS measure, a team composed of staff from Agricultural and Commodities Division and staff from the Legal Affairs Division will assist the panel. Panels considering cases relating to State Trading, subsidies, countervailing duties and antidumping duties are assisted by staff from the Rules Division. As noted above, officials of the WTO secretariat assigned to assist panels are also subject to the Rules of Conduct and bound by the obligation and independence, impartiality. Confidentiality and avoidance of direct or indirect conflicts of interest.

5.3 The Appellate Body

As per the Article 17.1 of the DSU, there shall be a standing Appellate Body to be established by the DSB. Unlike Panels, Appellate Body is a permanent international tribunant consisting of body of seven members entrusted with the task of reviewing the legal aspects of the Panel Reports. Thus, the Appellate Body is the second and final stage in the judiciary part of the Dispute Settlement System. This system was not in existence in the old GATT 1947. This Appellate Body is an innovation of the Uruguay Round of Multilateral Trade Negotiations, so that in the current dispute settlement system, individual Member of the WTO is no
longer able to prevent the adoption of the Panel Report, unless they have at least the tacit approval of all other Members represented in the DSB. The automatic nature of the adoption of the Panel Report not only denies the ‘losing party’ the chance of blocking the Report but also takes away the possibility for parties or other Members to reject panel reports due to substantive disagreement with the Panel’s legal analysis.

As per Article 17.13 of the DSU, if a party files an appeal against a Panel Report, the Appellate Body reviews the challenged legal issues and may uphold, reverse or modify the panel’s findings.\[88\]

This includes the following:

- the membership of Appellate Body
- the institutional structure of the Appellate Body
- access to Appellate review
- scope of Appellate review and
- mandate of Appellate Body

### 5.3.1 Membership of Appellate Body

The Appellate Body is composed of seven persons referred to as ‘Member’s of the Appellate Body’.\[89\]

As per Article 17.3 of the DSU, the Appellate Body shall comprise of persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of

\[88\] See Article 17.13 of the DSU.

\[89\] Note that in the context of DSU reform negotiation; the EC has proposed providing the DSB with the power to modify the number of Appellate Body Members, when necessary to deal with the work load.
covered agreements generally. They shall be unaffiliated to any
government. Besides, the Appellate Body Membership shall be
broadly representative of membership in the WTO. Therefore,
factors such as different geographical areas, levels of
development and legal systems are taken into account.\textsuperscript{90} In its
decision establishing the Appellate Body, the DSB stated, “The
success of the WTO will depend greatly on the proper
composition of the Appellate Body and persons of the highest
caliber should serve on it.”\textsuperscript{91}

The Appellate Body was established by the DSB in February
1995.\textsuperscript{92} At the end of 2007 the composition of Appellate Body
was as follows:

- Mr. Georges Abi-Saab (Egypt)
- Mr. Luiz Olavo Baptista (Brazil)
- Ms. Lilia Bantista (Philippines)
- Mr. Armugamangalam Venkitachalam Genesen (India)
- Ms. Jennifer Hilman (United States)
- Mr. George’s Sacerdofi (Itly)
- Mr. David Unterhalter (South Africa)

The Appellate Body Members are required to reside permanently
or continuously in Geneva and most do not. However Article
17.3 of the DSU requires that they be available at all times and
on short notice.\textsuperscript{93} To this end in view, Member keep the

\textsuperscript{90} See Ibid.
\textsuperscript{91} Ibid, para 4.
\textsuperscript{92} See Article 17.1 of the DSU.
\textsuperscript{93} Note that the Appellate Body Members have part-time appointments as
they are not so busy as to justify a full time employment at that time in 1995.
Appellate body secretariat informed of their whereabouts at all times.94

The Article 17.2 of the DSU states with respect to this appointment of Appellate Body Members and their terms of office,

The DSB shall appoint persons to serve on the Appellate Body for a four year term and each person may be appointed once. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor’s term.

As per Article 2.4 of the DSU, the DSB take the decision on the appointment of the Appellate body Members by concesus.95 Members of the Appellate Body are appointed by the recommendation of a selection committee, composed of the chairpersons of the General Council, the DSB, the councils for goods and services, the TRIPS council and the WTO Director

Since 1998 the Appellate Body membership has often been more than a fulltime job. In 2001, the employment arrangement of Appellate Body Members came under review by DSB to determine whether a move to full time employment was warranted. WTO Members failed however, to agree on such a charge – See WT/DSB/M/101 dated 8 April 2001, para 119.

94 See Rule 2(4) of the working procedure.

95 The DSB meeting of the 19th Nov. 2007. Chinese Taipei blocked the appointment of the new-Member to replace Members whose term of office expires in Dec. 2010 or June 2008. Chainese Taipri objected the appointment because it reportedly had deep concerns on the question of impartiality and qualification of one of the recommended candidates to serve the Appellate Body, while Chinese Taipei did not mention any candidate by name or nationality, it is clear that it object to the appointment of Ms. Yuejiaozhang (China).
General. The selection committee selects from among candidates nominated by WTO Members.

The Appellate Body Members must exercise their office without accepting or seeking instructions from elsewhere i.e., any international, governmental or non governmental organisation or any private source. As stated above, the Members of the Appellate Body are subject to the rules of conduct and are required to disclose the existence or development of any interest, relationship or matter that is likely to affect or give rise to justifiable doubts, as to their independence or impartiality. Further, they may not participate in the consideration of any appeal that would create a direct or indirect conflict of interest.

5.3.2 Structure and Composition of Appellate Body

The Appellate Body does not hear or decide appeals ‘en banc’. It hears and decides appeals in divisions of three Members.

According to Rule 6 of the working procedures of the Appellate review entitled division, which provides inter alia,

1. In accordance with paragraph 1 of the Article 17 of the DSU, a division consisting of three Members shall be established to hear and decide an appeal.

2. The Members consisting of a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and

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96 See Rule 2(3) of the Working Procedure.

97 Para II (1) of the Rules of conduct.

98 See Article 17.1 of the DSU and Rule 6(1) of the working procedures.
opportunity for all Members to serve regardless of their national origin.

3. A member selected pursuant to paragraph 2 to serve on a division shall serve on that division, unless

(i) he/she is excused from that division pursuant to Rule 9 or 10.

(ii) he/she has notified the Chairman and the presiding Member that he/she is prevented from serving on the division because of illness or other serious reason pursuant to Rule 12 or

(iii) he/she has notified his/her intentions to resign pursuant to Rule 14.

Unlike in the process for Panelist selection, the nationality of Appellate Body Members is irrelevant. Appellate Body Members can and will, sit in cases on which their countries of origin are party.

The Members of a Division select their Presiding Member.99

According to Rule 7(2) of the working procedures, the responsibilities of the presiding Member shall include,

- coordinating the overall conduct of the appeal proceedings.
- chairing all oral hearing and meetings related to that appeal and
- coordinating the drafting of the Appellate Report

99 See Rule 7(1) of the working procedures.
Appeal will be decided by the corresponding division to which that appeal is assigned. However, to ensure consistency and coherence in its case law and to draw on the individual and collective expertise of all the seven Members, the division responsible for deciding an appeal exchanges views with other Members on the issue raised by the appeal.\textsuperscript{100} This exchange of views, which may take two to three days, is held before the division has come to any definite views on the issue arising from the appeal.

A division makes all possible efforts to take its decision on the appeal by consensus. However, if a decision cannot be reached by consensus, the working procedures provide that the matter at issue be decided by a majority vote.\textsuperscript{101} Individual Members may express dissenting opinions in the report. However, Article 17.11 of the DSU requires in this respect, “Opinions expressed in the Appellate Body Report by individuals serving on the Appellate Body shall be anonymous.

So far only twice in EC-Asbestos and EC-Tariff preferences, did an Appellate Body Member express an individual opinion in an Appellate Body Report.”\textsuperscript{102}

\subsection*{5.3.3 Appellate Body Secretariat}

Appellate Body has its own separate secretariat to provide legal assistance and administrative support to the Appellate Body. To

\textsuperscript{100} See, Rule 4(3) of the working procedures. Each Member therefore receives all documents filed in an appeal. A Member who has a conflict of interest shall not take part in the exchange of views.

\textsuperscript{101} See Rule 3(2) of the working procedures.

\textsuperscript{102} On the separate opinion in EC-Asbestos.
ensure the independence of the Appellate Body, the Secretariat is linked to the WTO secretariat only administratively, but is otherwise separate. The Appellate Body Secretariat has its offices in the Centre William Rappard, the lake side premises of the WTO secretariat in Geneva. All meetings of the Appellate Body or of Divisions of the Appellate Body, as well as oral hearings in appeal are also held on the premises.

5.3.4 Access to Appellate Review

Appeals will be entertained only from parties to the dispute. Third parties and other WTO Members cannot appeal for a Panel Report. However, WTO Members who have notified the DSB of a substantial interest in the dispute at the time of the establishment of the panel\(^{103}\) can participate in the Appellate review proceedings.\(^{104}\)

During the first years of the WTO dispute settlement system all panel reports were appealed. The first panel report not appealed was the report in Japan-film circulated on 31\(^{st}\) March 1998. Of all panel reports circulated since 1995, 68% have been appealed.\(^{105}\)

This high rate of appeal is not necessarily a reflection of the quality of the panel reports, but rather of the fact that appealing an unfavourable panel report does not cost the ‘appellant’ anything. On the contrary, an appeal, even if eventually unsuccessful will allow a party, found to have acted

\(^{103}\) or within 10 days of the establishment of the panel.

\(^{104}\) See Article 18.1 of the DSU and Rule 19(1) of the working procedures.

\(^{105}\) See www.worldrdelaw.net/dsc/database/appealcount, asp, visited on 23 Nov. 2007.
inconsistently with WTO, to delay the moment at which it has to bring its measure into consistency. An appeal will also demonstrate to domestic consistencies that a Member has exhausted all legal means known to him.

5.3.5 Scope of Appellate Review

Article 17.6 of the DSU states the scope of the Appellate Review. As per the above provision an appeal shall be limited to issues of law covered in a panel report and legal interpretations developed by the panel.

In the EC-Harmons, The appellate Body found that the factual findings of panels are, in principle, excluded, from the scope of the Appellate review The Appellate Body stated,

Under Article 17.6 of the DSU, appellate review is limited to appeals on question of law covered in a panel report and legal interpretations developed by the panel. Findings of facts, as distinguished from legal interpretation or legal conclusions by a panel are, in principle, not subject to review by the Appellate Body.106

In some cases the characterization of specific issues before the panel as issues of facts, rather than as issues of law or legal interpretations, is fairly straight forward.

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106 Appellate Body Report, EC-Harmones, para 132, see also Appellate Body Report, EC-Bananas 111, para 239.
In EC-Hormones, the Appellate Body noted that:

“The determination of whether or not a certain event did occur in time and space is typically a question of fact.”\(^{107}\)

In some other cases, the task or distinguishing between issues of fact and issues of law can be a complex exercise. The Appellate Body has made it clear, however, that finding involving the application of a legal rule to specific fact or a set of facts or finding on issues of law and this fall within the scope of Appellate review. **As stated in EC-Hormones:**

“The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provisions is... a legal characterisation issue. It is a legal question.”\(^{108}\)

The Appellate Body used similar reasoning in Canada – Periodicals to explain why the panels determination of ‘like products’, for the purposes of Article 111:2 of the GATT 1994, was reviewable.

\(^{107}\) Appellate Body Report EC-Hormones, para 132.

\(^{108}\) Ibid, considerable reliance has been placed by later decisions on this proposition. In US-Antidumping Measures on oil country Tabular Goods, the Appellate Body held that, the qualitative assessment of facts against a legal requirement is a legal characterization of (those) facts, and as held in EC-Hormones, thus subject to Appellate review, See Appellate Body Report, US-Antidumping Measure on oil country Tabular goods, para 195, citing Appellate Body Report, EC-Hormones para 116. Similarly in US-soft wood Limberg, the Appellate Body found that the question as to whether the particular approach adopted by a domestic authority was fair and even-handed was a legal characterization of facts, thus unencumbered by Article 17.6, ee Appellate Body Report, US-Soft wood Lumber V, para 163.
“The determination of whether imported and domestic products are ‘like products’ is a process by which legal rules have to be appealed to facts.”\textsuperscript{109}

The panel’s factual determinations are, in principle, not subject to appellate review. A panel’s weighing and assessment of evidence before it is also, in principle, not subject to appellate review.\textsuperscript{110}

\textbf{In EC-Hormones} the, Appellate Body found that factual findings of panels are, in principle, excluded from the scope of Appellate review.

The Appellate Body stated under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretation developed by panel. Findings of facts as determined from legal interpretation or legal conclusions by a panel are, in principle, not subject to review by the Appellate Body\textsuperscript{111}. \textbf{In Korea-Alcoholic Beverages}, in which Korea sought to cast doubt on certain studies relied on by the Panel in that case, the Appellate Body remarked:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{109} Appellate Body Report, Canada-Periodicals, p.468.
\item \textsuperscript{110} Note that in US-offset Act (Byrd Amendment) Canada argued on appeal that Article 17.6 of the DSU prohibited the United States from challenging the credibility and weight the panel attached to two letters that had been in evidence before it. The Appellate Body, however rejected the Canada’s claim. It found that the comments by the united states formed part of the letter’s challenge to the panels legal findings whether these findings were supported by those letters was, according to the appellate body, an issue of law on which it had the authority to rule, see Appellate Body Report, US-offset Act (Byrd Amendment), para 220.
\item \textsuperscript{111} Appellate Body Report, EC-Hormones, para 132, see also Appellate Body Report, EC-Bananas III, para 239.
\end{itemize}
\end{footnotesize}
“The panel’s examination and weighing of evidence submitted fall, in principle, within the scope of the Panel’s discretion as the tries of facts and accordingly outside the scope of the appellate review. This is true, for instance, with respect to panel’s treatment of the Dodwell study, the Sofres Report and the Nielsen study, we cannot second-guess the Panel in appreciating either the evidentiary value of such studies or consequences, if any, of alleged defects in those studies. Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies.”

Thus panels have wide-ranging discretion in the consideration and weight; they give to the evidence before them.

However, a Panel’s discretion in the consideration and weight it gives to evidence is not unlimited.

Whether or not a Panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, it is also a legal question which of properly raised on appeal, would fall within the scope of Appellate Review.

In US-Offset Act (Byrd Amendment), the Appellate Body held that, an Article 17.6 of the DSU is clear in limiting the scope of the Appellate review to issues of law and legal interpretations, the Appellate Body has no authority to consider ‘new facts’ on

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114 See Appellate Body Report, Korea-Alcoholic Beverages, para 162.
115 Appellate Body Report, EC-Hormones, para 132, See also Appellate Body Report, Korea-Alcoholic Beverages, para 162.
appeal even if these new facts are contained in documents that are available on the public record.\footnote{See Appellate Body Report, US-offset Act (Byrd Amendment) paras 221-2. However, that a new fact in a document on appeal, if the document is expressly referred to in the measure in question and its contents were discussed before the Panel. The other party may draw to establish prejudice in entertaining such a document so as to render it inadmissible before the Appellate Body. See Appellate Body Report, Chile-Price Band system, para 13.}

**In US-Softwood Lumber V, Canada** asked that the United States be requested to submit certain documents to the Appellate Body. The Appellate Body declined to do so, on the ground that the materials at issue constituted new factual evidence, and, therefore, according to Article 17.6 of the DSU; fall outside the scope of the appeal.\footnote{Appellate Body Report, US-Softwood Lumber, para 9.}

If the data presented on appeal can be clearly traced to the data in the panel record and the way in which such data has been converted can be readily understood, the evidence presented on appeal will not amount to ‘new evidence’, excluded by Article 17.6.\footnote{See Appellate Body Report, Chili-Price Band System para 13; see also Appellate Body Report, EC-Export subsidies on sugar, para 242.}

**In Canada-Aircraft**, the Appellate Body held that ‘new arguments’ on appeal cannot be rejected, simply because they ‘are new’. However, the Appellate Body acknowledged that the possibility for the Appellate Body to ‘decide’ on a new argument that would involve reviewing new facts is foreclosed by Article 17.6 of the DSU.
In Canada-Aircraft, the Appellate Body:

to rule on the new argument, we would have to solicit, receive and review new facts that were not before in the panel, and were not considered by it. In our view Article 17.6 of the DSU manifestly precludes us from engaging in any such enterprise.\(^{119}\)

In US-FSC, the United States requested the Appellate Body to address a matter that it had not argued before the panel. In this case the Appellate Body ruled:

“In our view, examination of the substantive issues raised... would be outside the scope of our mandate under Article 17.6 of the DSU, as this argument does not involve either an issue of law covered in the panel report or ‘legal interpretation developed by the panel’. The panel was simply not asked to address the issues raised by the United State’s new argument. Further, the new argument now made before us would require us to address legal issues quite different from those which confronted the Panel and which may well require proof of new facts.”\(^{120}\)

5.3.6 Appellate Body Mandate

The mandate of the Appellate Body is primarily set out in Article 17.13 of the DSU, which states,

‘The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.’

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\(^{119}\) Appellate Body Report, Canada-Aircraft, para 211.

\(^{120}\) Appellate Body Report, US-FSC, para 103.
When the Appellate Body agrees with both the Panel’s reasoning and conclusion regarding the WTO consistency of a measure, it upholds the relevant findings. When the Appellate Body agrees with the conclusion but not with the reasoning leading to that conclusion, it modifies the relevant findings. If the Appellate Body disagrees with the conclusion regarding the WTO-consistency of a measure, it reverses the relevant findings.121

In most appeals, the results of the appellate review were mixed. Some of the findings appealed were upheld, some modified and/or reversed. The panel report as a whole, therefore, was modified.

Article 17.13 of the DSU allows the Appellate Body only to uphold, modify, or reverse the panel’s findings appealed; nevertheless, the Appellate Body has in a number of cases, gone beyond that mandate. In those cases, the Appellate Body has, explicitly or implicitly completed the legal analysis.122

Cases in which a panel report is appealed and the Appellate Body reverses the panel’s findings of violation, the question arises as to what the Appellate Body can do with regard to the claims of judicial economy did not address. A similar question arises in cases in which a panel concludes that a provision or provisions of WTO law (for eg. The TBT agreement as was the case in EC-Asbestos) is not applicable in the case at hand but in

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121 The distinction between ‘upholding and modifying’ a panel’s finding has not always been clear. Occasionally, the Appellate Body has ‘upheld’ a panel’s finding while criticising and disagreeing to some extent with panel’s reasoning, see for eg. Appellate Body Report, US-Hot Rolled Steel, paras 90 and 158 and Appellate Body Report, US-Lamb, para 188.

122 Examples for panel reports reversed; the Report in Guatemala-Cement and Canada-Dairy (Article 21.5 – New Zealand and US).
which, on appeal of this finding of inapplicability, the Appellate Body comes to opposite conclusion. What can the Appellate Body subsequently do in such situation?

In many domestic judicial systems, the appeals court would in similar situations remand the case to the court of 1st instance. However, the DSU does not provide the Appellate Body with the authority to remand a dispute to the Panel.123

In the absence of a remand authority, the Appellate Body is left with two options.

(i) either to leave the dispute unresolved or
(ii) to go on to complete the legal analysis

**In Canada—Periodicals, the Appellate Body stated**

“We believe the Appellate Body can and should complete the analysis of Article III.2 of the GATT 1994 in this case, by examining the measure with reference to its consistency with the second sentence in Article III.2, provided that there is a sufficient basis in the Panel Report to allow us to do so.”124

### 5.4 Other Bodies and Persons involved in WTO Dispute Settlement

Apart from the DSB, Panels, and the Appellate Body, there are a number of other bodies and persons involved in the settlement of

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123 In the context of the DSU reform negotiations Jordan and European committees tabled proposals to provide the Appellate Body with remand authority.

124 Appellate Body Report, Canada-Periodicals, 469.
dispute in the WTO. These bodies and persons include the following.

- Arbitrators under Articles 21.3, 22.6 and 25 of the DSU.
- The Permanent Group of Experts under Article 4.5 of the SCM Agreement.
- The facilitator under Annex V.4 of SCM Agreement.
- Experts under Articles 13.1 and 13.2 of the DSU, Article 11.2 of the SPS Agreement and Article 14 of the TBT Agreement.
- Expert Review Groups under Article 13.2 of and Appendix 4 to the DSU.
- Technical Expert Groups under Article 14.3 of and Annex 2 to the TBT Agreement.

5.4.1 Arbitrations Pursuant to Article 25 of the DSU

It is an alternative to adjudication by Panel and the Appellate Body. The parties to a dispute can resort to Arbitration (Art. 25.1 of the DSU). The parties must agree on the arbitration as well as the procedures to be followed (Art. 25.2 of the DSU). The parties to the dispute are thus free to depart from the standard procedures of the DSU and to agree on the rules and procedures they deem appropriate for the arbitration, including the selection of the arbitration. The parties must also clearly define the issues in dispute.

Before starting the arbitration proceedings, the parties must notify their agreement to resort to arbitration to all WTO Members. Other Members may become party to arbitration only with the agreement of the parties engaged in the arbitration. The
parties to the arbitration must agree to abide by the arbitration 
award, which once issued, must be notified to the DSB and the 
relevant councils and committees overseeing the agreement(s) in 
question (Article 25.2 and 25.3 of the DSU). The provision of 
Articles 21 and 22 of the DSU on remedies and on the 
surveillance of implementation of a decision apply to the 
arbitration award. (Article 25.4 of the DSU).

It is to be examined how the dispute settlement machinery works 
in the discharge of their functions. That will be discussed in the 
next chapter.
Chapter VI

PROCEEDINGS OF WTO DISPUTE SETTLEMENT AND CHALLENGES