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Federal Department of Economic Affairs FDEA
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WTO Division

The State of Play of the DSU Review

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Thematic Categories

- ❖ Third party rights
- ❖ Sequencing
- ❖ Post-retaliation
- ❖ Special & Differential Treatment and Effective compliance
- ❖ Transparency and confidential information
- ❖ Panel composition
- ❖ Amicus curiae
- ❖ Remand
- ❖ Flexibility and Member control
- ❖ Mutually agreed solutions
- ❖ Timeframes



Third Party Rights

Consultation stage

- Complaining party's decision (GATT XXII or GATT XXIII)
- Responding party's decision (DSU 4.11)
- Alternatives?
“all or nothing”; “double negative”



Third Party Rights

Panel stage

- Today:
- ✓ No determination of “substantial interest”:
Constitution at DSB meeting or within 10 days
- ✓ “Opportunity to be heard by the panel and
make written submissions to the panel”
- ✓ Panel may grant enhanced third party rights



Third Party Rights

Panel stage

➤ Enhancement of third party rights:

- ✓ Presence at **all** substantive meetings of the panel before the interim report is issued
- ✓ Written submission prior to **each** substantive meeting
- ✓ Oral statement to the panel, answering to questions: sessions of **each** substantive meeting set aside for that purpose



Third Party Rights

Panel stage

- ✓ Questions to parties and other third parties (without obligation of parties and other third parties to respond)

➤ “Price to pay”:

Additional third party rights only upon agreement by the parties to the dispute



Third Party Rights

Appellate Review

➤ Today:

- ✓ Third parties in panel proceedings may be third participants in Appellate Review
- ✓ “May make written submissions to, and be given an opportunity to be heard by, the Appellate Body”
- ✓ Written submission may reflect not only on Appellant’s but also on Appellee’s Submission (Rev. Rule 24 (1) of AB WP)



Third Party Rights

Appellate Review

- Enhancement of third participant rights:
 - ✓ Third parties and any other Member
 - ✓ Each third participant shall have opportunity to be heard by and to make a written submission to the AB
 - ✓ Reflection of submissions in AB report



Third Party Rights

22.6-Arbitration

➤ Today:

- ✓ No rule. Arbitrator may accept third parties or not.
- ✓ Participation for third parties uncertain and time consuming



Third Party Rights

22.6-Arbitration

- Enhancement of third party rights:
 - ✓ Any Member may participate
 - ✓ Application of DSU 10 *mutatis mutandis*

22.7-Appellate Review on Arbitration

Rights of third participants as in Appellate Review



Sequencing

Today:

- DSU 21.5 Compliance panel:
Disagreement of WTO consistency of measures taken to comply -> panel report within **90 days**
- DSU 22.2 situation:
Failure to comply with recommendations and rulings of the panel -> authorization to suspend concessions or other obligations within **60 days** after expiry of RPT the latest
- Practice: Requests according to DSU 21.5 and 22.6 -> request to suspend 22.6 arbitration.



Sequencing

Possible new sequencing

- Midpoint review
Disagreement of WTO consistency of measures taken to comply -> panel report within 90 days
- Notification of measures taken to comply
- Compliance Panel
- No additional RPT



Sequencing

Possible new sequencing

Request for authorization according to DSU 22.2 only...

- ✓ ... if no notification of intention to comply;
- ✓ ... if no notification after RPT of full compliance; or
- ✓ ... as a result of 21.5 proceedings the DSB has ruled that a measure taken to comply does not exist or is WTO inconsistent.

22.7 Appellate Review?



Post-Retaliation

- DSU 22.8: Suspension of concession shall be **temporary** and only applied **until such time as** the measure found to be inconsistent with WTO law has been removed
- There are no procedures foreseen in the DSU to end retaliation
- *DS320 United States – Continued Suspension of Obligations in the EC-Hormones Dispute*
 - Was the USA required to initiate a 21.5 compliance proceeding in response to EU's claim of compliance? -> answer: no
 - AB went further: Either party must initiate compliance panel proceedings as soon as possible; 21.5 proceedings only possible proceedings to solve a post retaliation situation
 - Contradiction in the AB reasoning: DS320 was initiated as an ordinary panel proceeding.



Post-Retaliation

- There is a common understanding:
 - ✓ To have explicit rules on post-retaliation
 - ✓ That the first step is to be taken by the original defendant
 - ✓ Disagreement on compliance -> 21.5 proceedings
 - ✓ Full compliance -> authorization to retaliate withdrawn
 - ✓ No full compliance -> possible 22.6 -> authorization may be modified or remain the same

- Points of divergence:
 - Who has to request the establishment of a 21.5 panel
 - How to motivate original defendant to indicate all measures taken to comply



S & DT

- Dispute Settlement Fund

(Disbursements to all Developing countries regardless their success in the dispute settlement proceedings; if lack of resources: in a dispute between a developed and a developing country and if the developing country wins -> developed country has to bear legal costs)

- ❖ Relationship to ACWL?

- ❖ Do interests of developing countries differ according to the status of the parties to the dispute?

- Collective Retaliation

- Cross-Retaliation