



# Overview of the WTO Dispute Settlement Mechanism

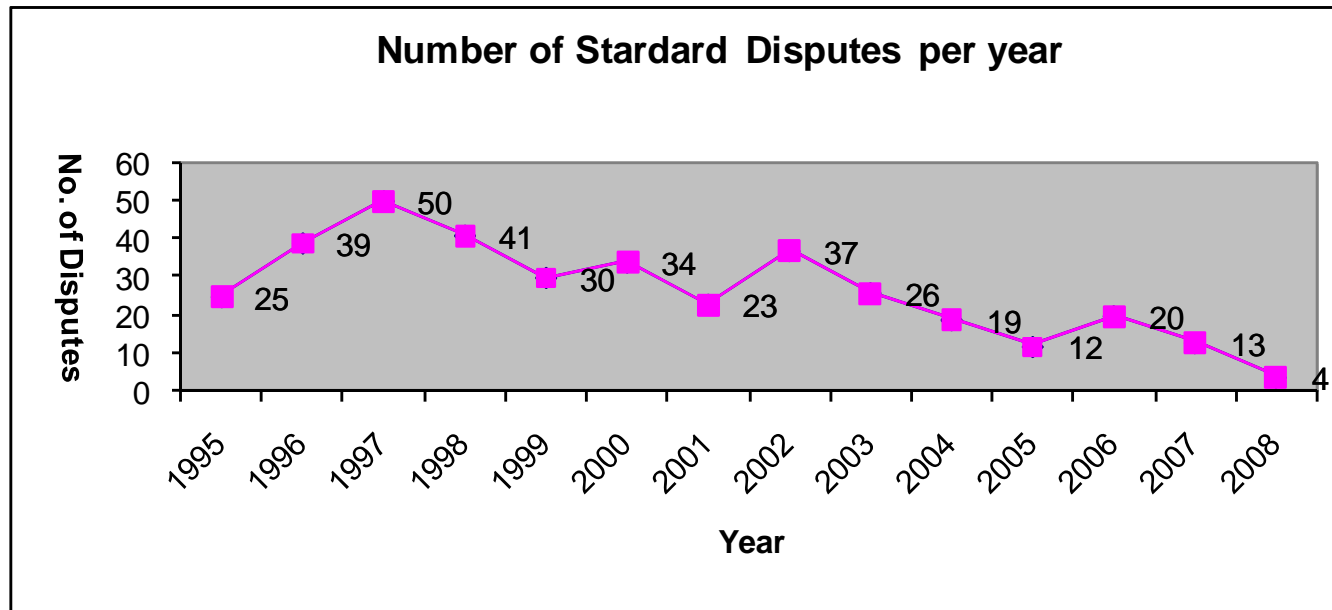
Lambert Botha  
International Trade Advisor

# Introduction



- General stats (**All data obtained from [www.worldtradelaw.net](http://www.worldtradelaw.net)**)
- General observations
- Consultation phase
- Panel phase
- Appellate review
- Implementation
- Surveillance and compliance
- Compensation and suspension of concessions

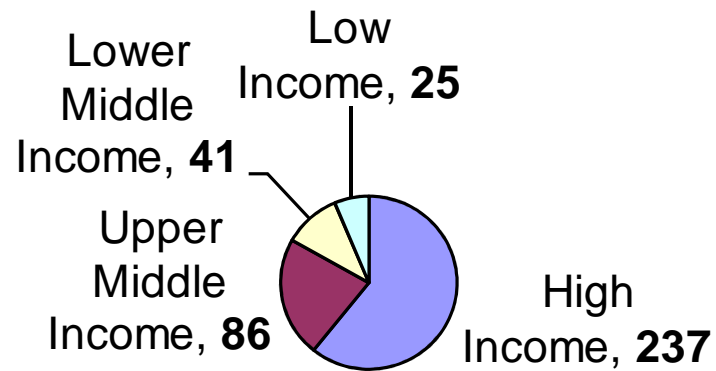
# General Stats



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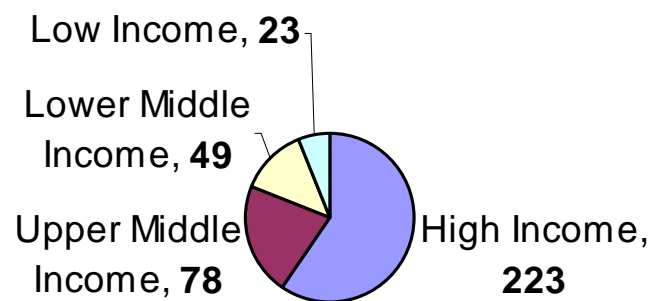
## Total Number of Complainants by Income Classification



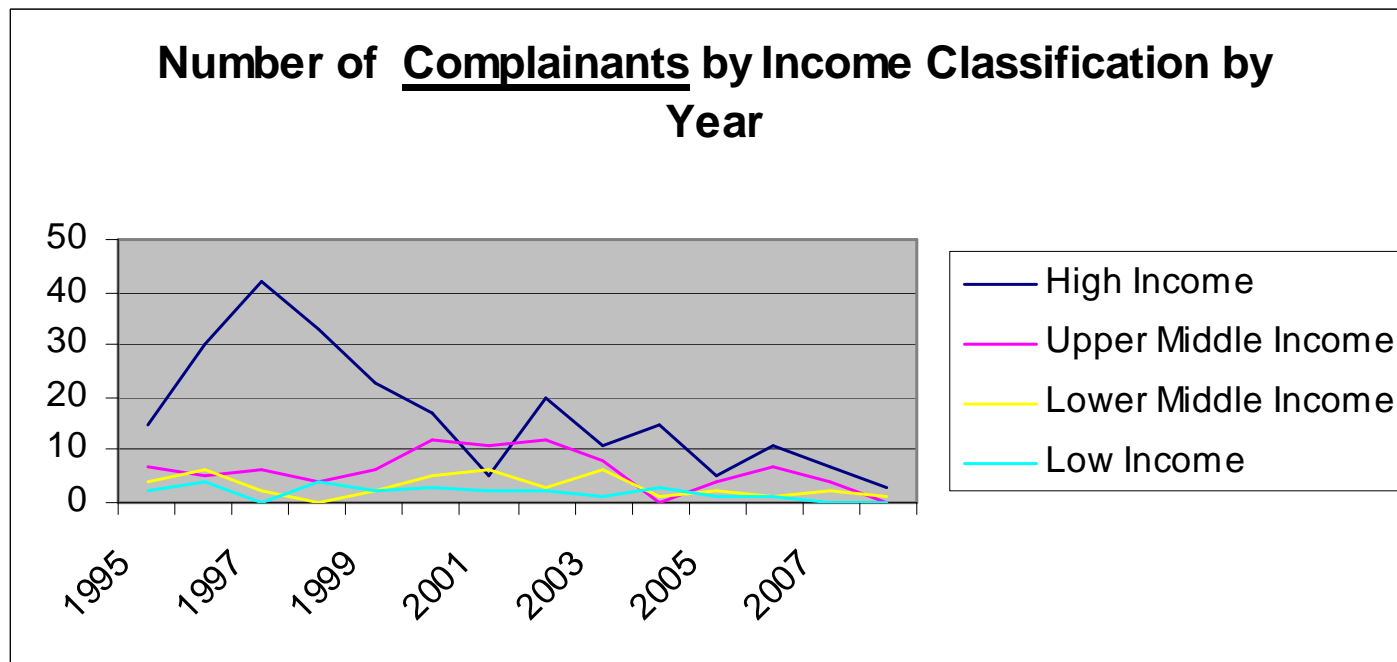
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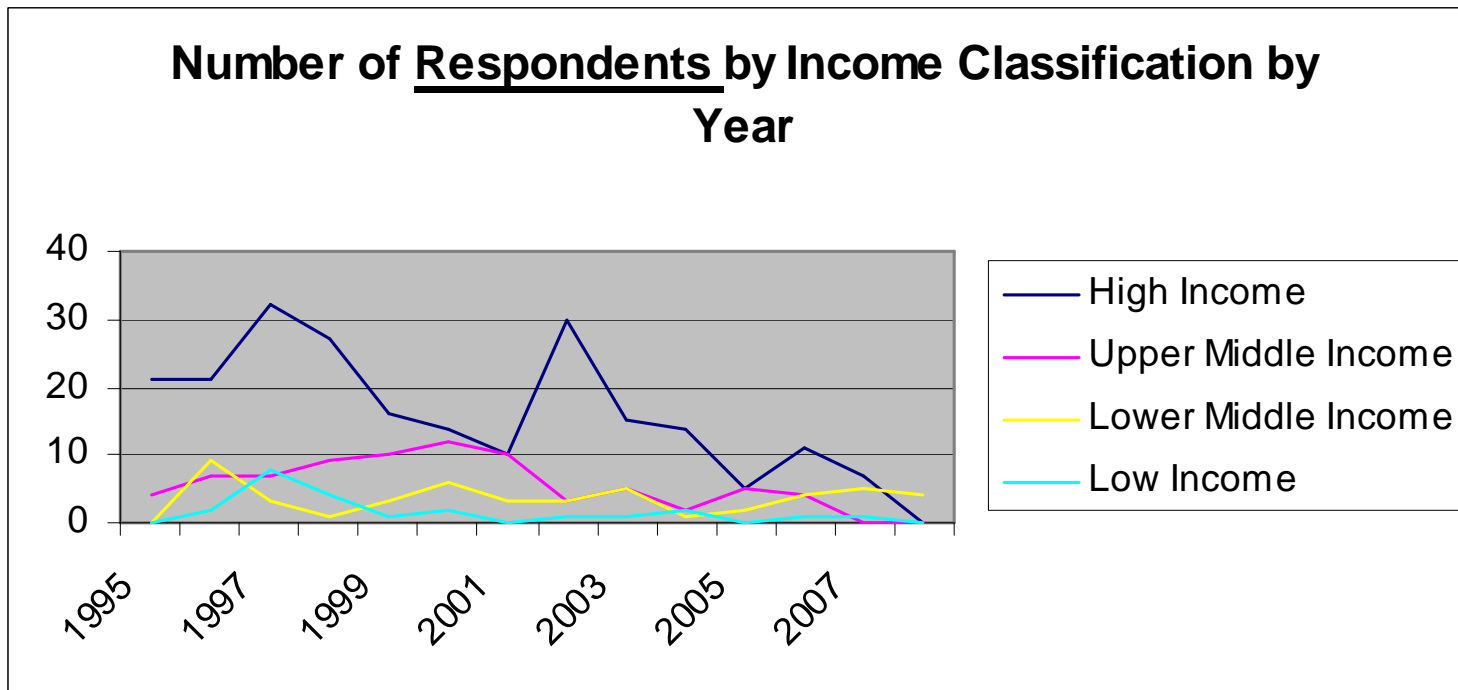
## Total Number of Respondents by Income Classification



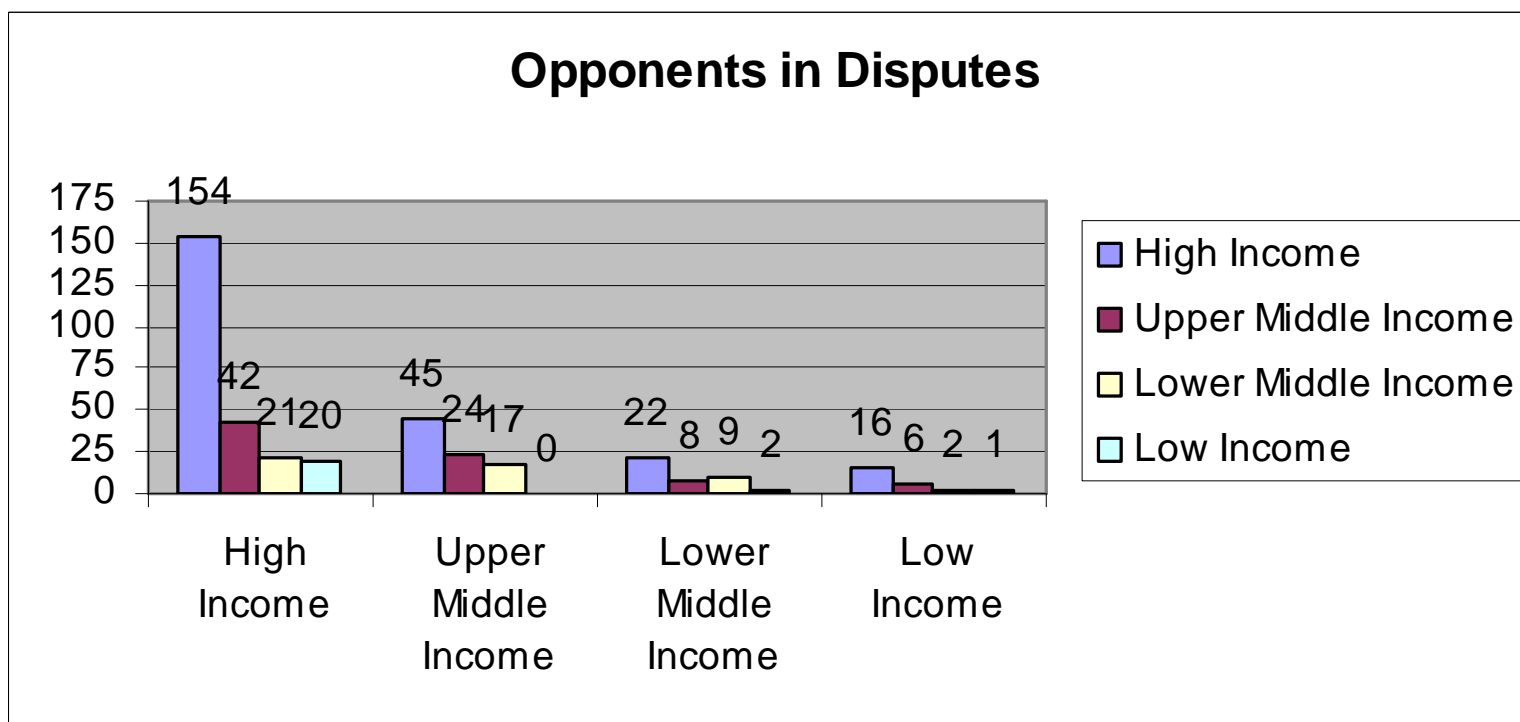
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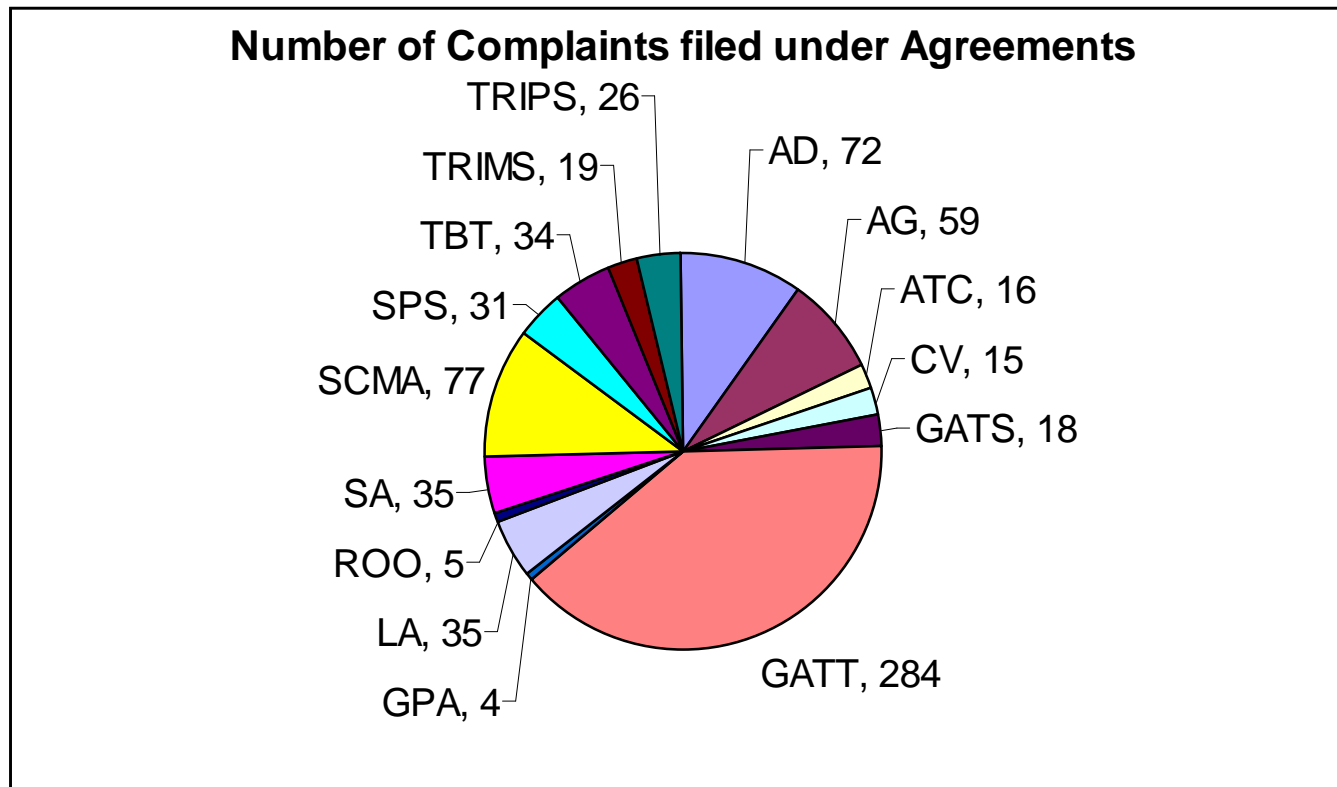


# General Stats





# General Stats



# General observations



## History:

- Prior to 1950's – Working parties – all interested Contracting Parties;
- From 1950's panels dealing with disputes subject to approval of GATT Council;
- 1983 GATT Legal Office established to assist panels;
- Increased “legalisation” away from “diplomats jurisprudence”
  - Bob Hudec;
- From a power-based to a rule based system;
- Failure: The request for the Establishment of a Panel, the adoption of a Panel report and authorisation for the suspension of concessions were all taken by consensus.

# General Observations



## Establishment of the World Trade Organisation (1995)

- Dispute Settlement 1 of 5 primary functions of the WTO;
- Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU);
- Single exclusive mechanism for the whole WTO - cannot resort to unilateral action;
- Purpose: to provide predictability and security and to preserve the balance of rights and obligations;
- Role is to *preserve* rights and obligations and to *clarify* provisions of any WTO agreement;
- Cannot add or diminish any rights of the Members;
- Aim: To bring about a positive resolution to trade disputes in a manner which is
  - Fair, Prompt and Effective;
- Innovative: ‘Reverse-consensus rule’; strict timeframes for panels; and the introduction of an appeal mechanism.
- Nature: Government to Government dispute settlement mechanism

# General Observations



## Causes of action

E.g. Article XXIII of GATT 1994

When any benefit has been nullified or impaired either directly or indirectly as a result of –

- A failure by any Member to carry out its obligations: so-called “violation complaints”;
- The application of a measure by a Member, whether or not in conflict with any Agreement: so-called “non-violation complaints”;
- The existence of any other situation: so-called “situation” complaints.

# General Observations



- Four stages in WTO dispute settlement proceedings –
- Consultation phase
- Establishment of a Panel
- Appellate Review
- Implementation of recommendations and rulings

# Consultation phase



- Mandatory
- Written request for consultations
  - Reasons for the consultation
  - The measure at issue
  - Legal basis for the complaints
- Good faith
- Confidential
- Possibility for other Members to join
- Good offices, mediation and conciliation assistance
- Mutually agreed solution must be notified:
  - Must be consistent with WTO Agreements
  - Must not nullify or impair the benefits of other Members
  - Must not impede the attainments of any of the objectives of WTO Agreements

# Panel phase



- Establishment
- Established by the DSB( General Council meeting as the Dispute Settlement Body);
- Upon the request of a party;
- Request must be in writing, it must state whether consultations where held, it must identify the specific measure at issue and provide a summary of the legal basis for the claim sufficient to present the problem clearly;
- The request must provide the terms of reference for the Panel to be established.

# Panel phase



- Terms of Reference

- TOR: standard: *“to examine in light of the relevant provisions of the AA the measure(s) referred to in document DS/1/SA and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the AA”*
- TOR: By agreement between the parties within 20 days failing which standard TOR applies.



# Panel phase



- The composition:
- Well qualified governmental and non-governmental individuals;
- Names nominated by Members to be placed on a roster;
- Secretariat propose names of Panellist to parties;
- Failing which the chairperson of the DSB appoints;
- Number: 3 or 5;
- Serve in personal capacity;
- Selection must ensure independence of members with sufficient background and wide spectrum of experience.

# Panel phase



- Parties : Complaining party – provision is made for multiple complainants; party complained against (defendant);
- Third parties – having a substantial interest
  - Opportunity to be heard;
  - Opportunity to make written submissions;
  - Usually during one session of the first substantive panel meeting
  - Extended third party rights (*EC-Bananas III*)
  - Submissions shall be reflected in Final Report.

# Panel phase



## Function

- Standard of review
  - Objective assessment of the matter before it including -
    - Facts (neither a *de novo* nor “total deference”)
    - Applicability of relevant agreement
    - Conformity with relevant agreement
- Judicial economy (only those claims which are necessary to resolve the dispute – (*US – Wool Shirts and Blouses*))
- Seek information: what about unsolicited information? (*AB in US-Shrimp*)
- Acting *Ultra Petita* – entertaining a matter not before it.

# Panel phase



## The Panel procedure

- Filing of submissions (4-9 weeks after date of composition);
- Oral presentations during first meeting (1-2 weeks after respondent has filed submission);
- Filing of rebuttals (2-3 weeks after first substantive meeting);
- Second meeting of the parties (1-2 weeks after simultaneous filing of rebuttals);
- Procedural Issues:
- Confidentiality – submissions remains confidential even after resolution of the dispute;
- Rules of Interpretation.

# Panel phase



- **Report:**
  - Contents: facts, arguments of the parties, findings of fact, applicability of the legal provisions and basic rationale for findings.
- **Interim review:**
  - First interim report: only descriptive parts (facts and arguments by parties)
  - Parties can comment
- **Then second interim report:** descriptive + findings and considerations
  - Parties may request review of report and maybe a meeting to discuss
- **Issued** to parties
- **Circulated** among all Members of DSB for adoption (negative consensus) **Average number of days btw circulation and adoption = 37.27** (Source: [www.worldtradelaw.net](http://www.worldtradelaw.net))

# Panel Phase



- Timeframes
  - From date of composition to date when final report is issued to parties – 6 months
    - In cases of urgency/perishable products – 3 months
  - In no case > 9 months from date of establishment of panel to date of circulation of final report to Members of the WTO for adoption (if not appealed). If appealed  $\approx$  12 months

# Panel Phase



Timeframes – **Averages between -**

- Panel Establishment and Composition : **70.73 Days**  
(Art. 8:7 = 30 days)
- Composition and Interim Report: **255.68 Days**
- Composition and Final Report to Parties: **318.27 Days**
- Composition and Final Report Circulated: **346.59 Days**
- Establishment and Final Report Circulated: **417.32 Days (13.91 Months) – (15.15 months until adoption)**  
(Source: [www.worldtradelaw.net](http://www.worldtradelaw.net))

# Appellate Review Phase



## Stats

Total number of Panel Reports circulated:

**139**

Total number of Panel Reports appealed:

**94**

Percentage: **67.63%**

(Source: [www.worldtradelaw.net](http://www.worldtradelaw.net))



# Appellate review phase



- Appellate Body – composition
- 7 persons, but only 3 serve to adjudicate over a matter.
- Permanently appointed for a maximum period of 8 years.
- Ad hoc.
- Demonstrated expertise in law, international trade law and the subject matter of the agreements generally.

# Appellate Review Phase



- Participants (not parties)
- Only the complaining or responding party can initiate appellate review
- Commences with filing of Notice of Appeal
- Cross-appeal possible
- Third participants may file submissions (within 25 dates of date of filing of Notice of Appeal)

# Appellate review phase



- **Scope of jurisdiction:**
- Limited to
  - issues of law in the Panel Report;
  - the legal interpretations developed by the Panel;
  - distinction btw issues of law and legal interpretation.
- Uphold, modify or reverse findings of Panel
- No remand
- Completing the analysis – require sufficient factual findings/undisputed facts in the Report

# Appellate Review Phase



- Working proceedings:
- Established by AB
- Opinions anonymous
- Confidential
- No *ex parte* communication
- Amicus Briefs –
  - *US – Shrimp (Unsolicited – part of party’s submission)*
  - “must be pertinent and useful in the appeal” – *US Lead and Bismuth II (unsolicited – direct to AB)*
  - *EC – Asbestos - criteria*
  - *EC – Sardines – Member files amicus brief*

# Appellate Review Phase



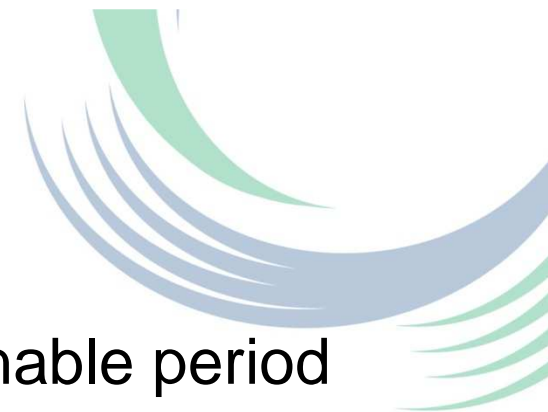
- Timeframes
  - 60 days, maximum 90 days from date of filing of Notice of Appeal
- Average number of days btw –
  - Circulation of Panel Report and Filing of Notice of Appeal: 44.68
  - Notice of Appeal and circulation of AB Report: 89.20
  - AB Report Circulation and Adoption: 22.55
  - Average total number of days from circulation of Panel Report and Adoption of AB Report: 156.43 (5.21 Months)
  - (Source: [www.worldtradelaw.net](http://www.worldtradelaw.net))

# Implementation



- After adoption of Report:
- Concerned party must indicate how it intends to comply (within 30 days after adoption of Report)
- If prompt compliance impractical, then reasonable time period allowed (*no automatic right to reasonable time period – only in compelling cases*):
  - As suggested by Member concerned and approved by DSB (within 30 days from adoption of report)
  - Or as agreed between the Parties (within 45 days from the adoption of report) – **Average: 9.25 months**
  - Or established through arbitration – 15 months (21(3)(c)) (within 90 days from adoption of Report) – **Average : 11.82 months (Source: [www.worldtradelaw.net](http://www.worldtradelaw.net))**

# Implementation



- What are the factors determining reasonable period of time?
- Time-frame allowed by national legislation to bring measure into conformity (*Korea – Alcoholic Beverages*)
- Legal considerations v other considerations (*Canada- Pharmaceutical Patents; US – 1916 Act*)
- Complexity of proposed implementing measure (*Canada- Pharmaceutical Patents*)
- Means of implementation – administrative or cumbersome legislative process
- The flexibility of the legislative process with respect to timing or scheduling (*Canada – Patent Term*)
- Steps taken since adoption to comply (*US – Section 110(5) Copyright Act*)
- Developing countries (*Indonesia – Autos*)

# Surveillance



- On the agenda of DSB 6 months after the adoption of period of reasonable time, after that it remains on the agenda until full compliance
- “Naming and shaming” mechanism



# Compliance



- Dispute relating to compliance:
- Back to original panel which need to make a ruling within 90 days (21(5)) **Average number of days btw referral of matter and circulation of the Report to Members: 230.72 (7.69 Months) (Source: [www.worldtradelaw.net](http://www.worldtradelaw.net))**
- Examine whether implementing steps conform to recommendations and rulings of the DSB *as well as*
- Whether those steps taken to comply, conform to the provisions of the relevant covered agreement. (*Canada – Aircraft (Article 21.5 – Brazil)*)
- Sequencing problem under Articles 21(5) and 22 (2)+(6)
- **Percentage of Article 21(5) reports appealed: 62.5%**

# Compensation



- What are the options for compliance:
- Full implementation by bringing the measure into conformity
- If not done within reasonable period: compensation to be agreed upon between parties – temporary measure on MFN basis pending the withdrawal of the inconsistent measure.

# Suspension of concessions



- If no agreement on compensation reached: The affected party may request authorisation from DSB to suspend concessions equivalent to level of nullification and impairment suffered;
- Within same sector under same agreement or unless impractical or ineffective;
- Within different sector under same agreement ;or
- Under different agreement.
- Equivalency: level of suspension = the level of nullification and impairment;
- Article 22.6 arbitration – to be completed within 60 days from expiry of reasonable period;
- Date for calculation of level of nullification and impairment: date of expiry of reasonable period.



Thank you



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