

Dispute Settlement in the World Trade Organization

by Practical Law Commercial Transactions

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A Practice Note describing the World Trade Organization's (WTO) mechanism for resolving trade disputes between member countries. This Note addresses the WTO's rules and procedures for settling disputes, including how to initiate an action before the WTO Dispute Settlement Body (DSB), appealing decisions to the WTO Appellate Body, and the tools for ensuring that countries comply with WTO decisions, such as WTO-authorized retaliatory measures.

The World Trade Organization (WTO) has one of the most active international dispute settlement mechanisms in the world. Since 1995, the WTO has heard over 500 disputes and issued rulings in over 350 of those cases. The WTO's dispute settlement mechanism is a legally binding system that commits member countries to settle their disputes in a multilateral forum rather than taking action unilaterally.

This Note discusses the WTO's rules and procedures for settling disputes between nations, including how a nation initiates an action before the Dispute Settlement Body (DSB), appeals panel decisions to the WTO Appellate Body, and ensures that counterparties comply with final decisions.

For more information on the WTO, see [Practice Note, Treaties and Protocols Impacting the International Transportation of Goods: World Trade Organization](#).

Resolving Disputes Before the WTO

A dispute arises when a member country (or group of countries) believes that another WTO member has adopted a trade policy or taken some other action that violates a WTO agreement or commitment. Rather than taking unilateral action against other countries for potentially violating WTO agreements, WTO members must try to settle disputes through the WTO's dispute settlement mechanism (see [Stages of the Dispute Settlement Process](#)).

The Dispute Settlement Understanding (DSU) governs the procedures for the dispute settlement mechanism, including setting the time limits for settling disputes (see [WTO: Understanding on Rules and Procedures Governing the Settlement of Disputes](#) and [Timeframe for Resolving Disputes](#)). The DSU applies to most disputes arising under any WTO agreement. Only governments and separate customs territories can participate directly as parties or third parties in WTO disputes.

For a list of covered agreements, see [WTO: Understanding on Rules and Procedures Governing the Settlement of Disputes, Appendix 1](#). For a list of disputes sorted by criteria such as WTO Agreement, member, product, or service, see [WTO: Find disputes cases](#).

Dispute Settlement Body

The DSB, which consists of representatives of all WTO members, administers the WTO's dispute settlement mechanism. It has the authority to:

- Establish dispute settlement panels.
- Refer matters to arbitration.
- Adopt reports from panels, the Appellate Body, or an arbitrator.

- Monitor the implementation of WTO recommendations and rulings.
- Authorize prevailing parties to adopt retaliatory measures if a country does not comply with a ruling.

Under Article 2.4 of the DSU, the DSB generally operates by consensus. Therefore, the DSB may take an action unless a WTO member present at the meeting formally objects to the proposed action.

However, a special procedure, known as negative or reverse consensus, applies when the DSB:

- Establishes panels.
- Adopts panel and Appellate Body reports.
- Authorizes retaliation.

Under this procedure, the DSB is authorized to take the above three actions unless it decides by consensus **not** to do so. This prevents individual WTO members from blocking DSB decisions in these three areas.

Stages of the Dispute Settlement Process

The WTO's dispute settlement process is divided into the following stages:

- Mandatory consultation between the parties (see [Consultations Between Members](#)).
- If consultation fails, convening a panel and receiving a decision from the panel (see [Requesting a Panel to Hear a Dispute](#)).
- Optional appeal to the Appellate Body (see [Appealing a Panel Ruling](#)).

Arbitration is available as an alternative to dispute resolution by panels and the Appellate Body, but it is rarely used. Arbitration is more often used to resolve specific issues that arise in the compliance phase after the DSB adopts a panel or Appellate Body report (see [Failure to Comply and the Retaliatory Repercussions](#)).

The WTO's priority is to settle disputes through consultation before convening a panel and adopting a ruling. If the members cannot settle the dispute, the WTO's primary objective is to withdraw the violating measure or action. The DSU also describes what retaliation or other actions a prevailing member can take if another member does not comply with a ruling issued against it (see [Failure to Comply and the Retaliatory Repercussions](#)). Retaliation is considered a tactic of last resort.

Consultations Between Members

Under Article 4 of the DSU, a WTO member can request confidential consultations with another member relating to measures or actions that allegedly violate any covered WTO agreement. If a member requests consultations with another member, the defending member must reply within ten days after receipt of the request and enter into consultations within 30 days.

If the members do not resolve their dispute within 60 days of beginning their consultation, the complaining member can request that the DSB establish a panel to hear the dispute. The complaining member can also request a panel earlier than this 60-day period if either:

- The defending member has failed to reply or enter into consultations in the prescribed timeframe.
- The disputants agree that consultations have been unsuccessful.

Requests for consultation must be in writing, sent to the DSB and the defending member, and explain the reason for the request. The request must identify the measures at issue and describe the legal basis for the complaint.

During consultations, the parties to the dispute can also request that the WTO Director-General mediate the dispute.

If another member has a substantial trade interest in the consultation, it can notify the consulting members and the DSB and request to join the consultation. These third parties are permitted to join the consultation provided that the defending member in the consultation agrees that the claim of substantial interest is well-founded. These third parties also participate in the later stages of the dispute settlement process by submitting written arguments and attending hearings.

Requesting a Panel to Hear a Dispute

If consultation fails, the complaining member can request that the DSB convene a panel of experts to hear the dispute and make an objective assessment of the facts and issues. The request must:

- Be in writing.
- Indicate whether the members held consultations.
- Identify the specific measures at issue.
- Provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly.

A complaint can be "as such," "as applied," or both. As such claims challenge the measure independent of its application in a specific setting and are intended to prevent the defending member from taking actions or measures before the fact.

After arguments and hearings, the panel issues a report on whether the measure at issue violates a WTO agreement.

Establishing a Panel

If a member requests a panel, the DSB must establish one at the second DSB meeting where the request appears on the agenda, unless the DSB decides by consensus not to establish a panel. Effectively, this means that a defending member can block a request the first time a complaining member makes it at a meeting, but the request will generally automatically be honored the second time. The DSB normally meets once per month. However, a complaining member can request that the DSB meet for the sole purpose of considering a panel request.

A panel is usually composed of three experts (five experts in exceptional cases if agreed to by the parties) who are not citizens of any party to the dispute or third parties. WTO members regularly submit names for inclusion on a roster of potential panelists, known as the indicative list, which is maintained by the WTO Secretariat. However, individuals may be selected for panels even if they are not on this list.

The Secretariat proposes panelists to the disputing members, who can then oppose the selections only for compelling reasons. If the parties to the dispute fail to agree on panelists within 20 days from when the DSB establishes the panel, either party may request that the WTO Director-General appoint panel members.

The WTO does not have permanent panels or panelists. A different panel is formed on an ad hoc basis for each dispute. Although some panelists have served on more than one panel, most panelists serve only once.

Panelists, as well as anyone serving on the Appellate Body or as an arbitrator, must comply with the WTO's rules of conduct (see [WTO: Rules of conduct for the understanding on rules and procedures governing the settlement of disputes](#)). In particular, panelists must, among other things:

- Be independent and impartial.
- Avoid direct or indirect conflicts of interest.
- Consider only issues raised in, and necessary to fulfill their responsibilities within, the dispute settlement proceeding.
- Not incur any obligation or accept any benefit that would interfere with or could give rise to justifiable doubts about the proper performance of their dispute settlement duties.
- Maintain the confidentiality of dispute settlement deliberations and proceedings, as well as any information that a party identifies as confidential.
- Not engage in [ex parte](#) communications with parties to the dispute.

If a panelist, Appellate Body member, or arbitrator materially violates the WTO's rules of conduct, they can be disqualified from participating in the dispute settlement.

Panel Hearings and Reports

After the DSB establishes the panel and selects the panelists, the panelists begin the process of hearing the dispute. As part of this process, the panel receives written submissions and hears oral arguments from the disputing members and any interested third parties. A panel can also seek information and technical advice from any individual or body that it finds appropriate, and can consult experts for factual issues concerning scientific or technical matters.

After the first round of written submissions and oral argument, the parties submit written rebuttal arguments and participate in a second, rebuttal hearing. After considering these submissions and hearings, the panel issues a descriptive report of the facts and arguments to the parties. The parties to the dispute generally have two weeks to review and comment on this report. After considering the parties' written comments, if any, the panel then

submits the report, along with its findings and conclusions, to the parties as an interim report. The parties can review the report, submit additional written comments, and request another hearing.

After a review period, the panel issues a final report to the disputing parties and later to all WTO members. Generally, the panel must send the final report to the disputing parties within six months from when the DSB composes the panel. The period can be shortened to three months in cases of urgency, such as disputes involving perishable goods. Extensions are also permitted in complex cases.

The DSB adopts a panel report within 60 days after the panel circulates the report to WTO members, unless either:

- A party to the dispute appeals the report.
- The DSB decides by consensus not to adopt the report.

The following table outlines the DSU's proposed timetable for a panel's work:

3-6 weeks after the DSB composes the panel:	The complaining party submits its first written argument.
2-3 weeks later:	The responding party submits its first written argument.
1-2 weeks later:	The panel holds its first, substantive meeting with the parties (and interested third parties, if any).
2-3 weeks later:	The parties to the dispute submit their written rebuttals.
1-2 weeks later:	The panel holds its second, substantive meeting to hear rebuttals.
2-4 weeks later:	The panel issues its descriptive report to the parties to the dispute.
2 weeks later:	The parties to the dispute submit their respective written comments on the descriptive report.
2-4 weeks later:	The panel issues its interim report, including its findings and conclusions, to the parties to the dispute.
1 week later:	The deadline for either party to request a review of the interim report.
2 weeks later:	The panel completes additional meetings, if a review is requested.
2 weeks later:	The panel issues its final report to the parties.
3 weeks later:	The panel circulates its final report to all WTO members.

(DSU, Appendix 3.)

After the DSB adopts a panel report, the WTO gives the losing member a reasonable period of time to implement any changes or policies outlined in the report (see [Complying with WTO Decisions](#)).

Appealing a Panel Ruling

If a party to a dispute disagrees with a panel report, it can appeal to the WTO Appellate Body. Only parties to the dispute, not third parties, can appeal a panel report. Like panel proceedings, appellate proceedings are confidential.

Composition of the Appellate Body

The Appellate Body is a standing body of seven members appointed by DSB consensus, three of whom serve on any one case.

Appellate Body members are recognized experts who must be broadly representative of the WTO membership, but they may not be affiliated with any government. They are appointed for four-year terms and may be reappointed once for another four-year term. Their terms are staggered so that, on average, part of the Appellate Body's membership changes every two years.

Currently, the Appellate Body has only three judges — the minimum number required to hear an appeal — because over the past several years, the US has blocked appointments to fill vacancies as judges' terms have expired. The US has taken this action due to various concerns, including:

- Its disagreement with an Appellate Body procedure that allows Appellate Body judges whose terms have expired to complete their work on appeals to which they were assigned, if they already heard the appeal.

- Its position that the Appellate Body has addressed issues that were not strictly necessary for its disposition of appeals.
- The Appellate Body's failure to issue reports within prescribed timeframes (see [Appellate Procedures](#)).

The terms of two of the remaining three Appellate Body judges expire on December 10, 2019. If new judges are not appointed to fill those vacancies, the Appellate Body would be unable to hear new appeals after this date. In anticipation of this possible development, the European Union and the following countries have agreed on an interim appeal arbitration arrangement based on existing WTO rules that, if necessary, would apply to disputes between the EU and these countries:

- Canada (see [European Commission: Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement](#)).
- Norway (see [European Commission: Interim Appeal Arbitration Pursuant to Article 25 of the DSU](#)).

For more information about the impasse involving the appointment of Appellate Body judges and its potential consequences, see [WTO: Appellate Body Annual Report for 2018](#).

Appellate Procedures

WTO appeals are governed by the Appellate Body's working procedures (see [WTO: Working procedures for appellate review](#)). A member commences an appeal by submitting a written Notice of Appeal to the DSB. This Notice of Appeal must include:

- The title of the panel report under appeal.
- A brief statement of the nature of the appeal, including:
 - the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
 - a list of the legal provisions of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
 - an indicative list of the paragraphs of the panel report containing the alleged errors.
- The name of the party to the dispute filing the Notice of Appeal.
- The service address, telephone, and fax numbers of any parties to the dispute.

On the same day that it files a Notice of Appeal, the member must provide a written submission to the WTO Secretariat, other parties to the dispute, and third parties. This written submission must include:

- A precise statement of the grounds for the appeal, including:
 - the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel; and
 - the party's legal arguments in support of its position.
- A precise statement of the provisions of the covered agreements and other legal sources on which the party relied.
- The nature of the decision or ruling the party seeks.

Appeals are limited to issues of law covered in the panel report and the panel's legal interpretations.

Any party that wants to dispute the allegations in the Notice of Appeal must provide a written submission to the WTO Secretariat, the appellant, other parties to the dispute, and third parties. This written submission must include:

- A precise statement of the grounds for opposing the specific allegations of errors raised in the appellant's submission, and the party's legal arguments in support.
- An acceptance of or opposition to each ground set out in the appellant's submission.
- A precise statement of the provisions of the covered agreements and other legal sources on which the party relied.
- The nature of the decision or ruling the party seeks.

These opposition submissions must be filed within 18 days after the appellant files the Notice of Appeal.

While a third party cannot initiate an appeal, it can participate in an appeal by:

- Filing a written submission describing the grounds and legal arguments in support of its position.

- Notifying the WTO Secretariat in writing if it intends to appear at the oral hearing, and, if so, whether it intends to make an oral statement.

Third party submissions must be filed within 21 days after the appellant files the Notice of Appeal.

The Appellate Body generally must hold an oral hearing between 30 and 45 days after the appellant files a Notice of Appeal. Within 60 days of being notified of an appeal, the Appellate Body must issue a report upholding, reversing, or modifying the panel report. This period can be extended to 90 days.

Within 30 days of receiving an Appellate Body report, the DSB must adopt the report and the disputing parties must unconditionally accept the report unless the DSB decides by consensus not to adopt the report.

Timeframe for Resolving Disputes

Generally, a case before the WTO should not take more than one year, or 15 months if the case is appealed. The agreed time limits are flexible and parties can settle the dispute at any stage of the WTO's mechanism.

The following table outlines approximate maximum periods for each stage of a dispute settlement procedure after a member nation has submitted a formal complaint to the WTO:

60 days:	The parties to the dispute meet for consultation and possible mediation (see Consultations Between Members).
45 days later (if a party requests a panel):	The DSB establishes the panel and appoints panelists (see Establishing a Panel).
6 months later:	The panel sends its final report to the parties after conducting hearings (see Panel Hearings and Reports).
3 weeks later:	The parties comment on the report and the panel sends the final report to all WTO members.
60 days:	The DSB adopts the report unless either party appeals or the DSB decides by consensus not to adopt the report.
Total = 1 Year	This timeframe assumes neither party appeals.
60-90 days:	The Appellate Body issues its appeals report, if a party appeals (see Appealing a Panel Ruling).
30 days later:	The DSB adopts the appeals report.
Total = 15 Months	This timeframe assumes a party has appealed the panel's report.

The Appellate Body has experienced an increase in the number of appeals, especially those involving large and complex disputes. This factor, along with several unfilled vacancies on the Appellate Body (see [Composition of the Appellate Body](#)), have resulted in a backlog of cases and delays in Appellate Body decisions.

Complying with WTO Decisions

Within 30 days after the DSB adopts a panel or Appellate Body report, a member whose measure has been found to violate a WTO agreement must inform the DSB of its implementation plan.

If it is impractical for a member to comply immediately with a WTO decision, the WTO generally gives the member a reasonable period of time to comply. Under the DSU, a reasonable period of time can be either:

- The period of time proposed by the member concerned, provided that the DSB approves this period.
- A period of time mutually agreed to by the parties to the dispute within 45 days after the DSB adopts the ruling, if the DSB does not approve the period from the bullet above.
- A period of time determined through binding arbitration within 90 days after the DSB adopts the ruling, if the DSB does not approve the period from the first bullet and the parties to the dispute have not reached an agreed period.

(DSU, Article 21.3.)

After this period, the DSB expects a member to fully implement the WTO ruling and act consistently with that ruling. Usually, a member can comply with a WTO decision by either:

- Withdrawing the measure at issue.
- Modifying or replacing the measure at issue.

If a member fails to comply with a WTO ruling, the prevailing member in the dispute can request remedial measures.

Compliance Panels

After the DSB adopts a report, either party to the dispute can request that the DSB convene a compliance panel if there is a disagreement over whether a losing, defending party is complying with the WTO ruling. Whenever possible, the compliance panel should be the same panel that originally heard the dispute. The compliance panel issues its report within 90 days after the dispute is referred to it. These reports can be appealed to the Appellate Body. The DSB then adopts the compliance panel or Appellate Body report.

Failure to Comply and the Retaliatory Repercussions

Most member countries comply with WTO rulings. In 2014, the WTO estimated that the compliance rate is about 90 percent (see [WTO: Resolving trade disputes between WTO members](#)). However, the DSU contains procedures for dealing with members that do not comply with WTO decisions.

Under Article 22 of the DSU, if a member does not comply with a WTO decision issued against it within the prescribed period, the prevailing party can request that the losing party negotiate a compensation agreement. If the parties do not reach an agreement within 20 days, the prevailing party can request permission from the DSB to retaliate against the losing party.

Under retaliation, a prevailing party suspends concessions (such as a tariff concession under the General Agreement on Tariffs and Trade 1994) or obligations owed to the non-complying party under a WTO agreement. For example, in May 2017 the WTO permitted Mexico to suspend tariff concessions to the US after the US repeatedly failed to adequately modify a measure that violated WTO commitments (see [WTO: Mexico granted authorization to suspend concessions in tuna dispute with United States](#)).

When considering what concessions or other obligations to suspend, the prevailing party must apply the following principles:

- The party should first try to suspend concessions or other obligations regarding the same sector as that in which the panel or Appellate Body finds a violation or other nullification or impairment.
- If it is not practicable or effective to suspend concessions or other obligations regarding the same sector, the party may seek to suspend concessions or other obligations in other sectors under the same WTO agreement.
- If it is not practicable or effective to suspend concessions or other obligations regarding other sectors under the same WTO agreement, and the circumstances are serious enough, the party may seek to suspend concessions or other obligations under another covered agreement.

The DSB must authorize a retaliation request within 30 days after the compliance deadline expires, unless either:

- The DSB refers the issue to arbitration (see, for example, [WTO: US request for retaliation against India in farm goods dispute referred to arbitration](#) and [WTO: Canada's request to suspend concessions in "US — COOL" dispute goes to arbitration](#)).
- The DSB decides by consensus not to authorize the request.
- The covered agreement prohibits a suspension.

Retaliation and compensation agreements are both meant to be temporary remedies. The WTO prefers full implementation of a WTO decision instead of these measures.

US Involvement in the WTO Dispute Settlement Process

The US is actively involved in the WTO dispute settlement process. Historically, the US has both initiated and been the recipient of more complaints than any other WTO member. Under Section 301 of the Trade Act of 1974, the US Trade Representative (USTR) initiates trade disputes in the WTO for the US and represents the US in WTO disputes ([19 U.S.C. § 2411](#)). The USTR maintains a list of pending and completed disputes, as well as lists of disputes sorted by complainant, respondent, and subject area (see [USTR: WTO Dispute Settlement](#)).

Interested parties, including domestic firms and workers, representatives of consumer interests, and US product exporters, can petition the USTR to:

- Investigate a foreign government policy or practice that potentially harms US commerce.
- Initiate a WTO dispute.

([19 U.S.C. § 2412](#) and 15 C.F.R. pt. 2006.)

For more information on the USTR's responsibilities under Section 301 of the Trade Act of 1974, see [Practice Note, US Trade Remedies and Other Import Relief Measures: Section 301 of the Trade Act of 1974](#).

Effect of WTO Decisions in the US

Federal courts have held that WTO decisions are not binding on the US or on US courts ([Corus Staal BV v. Dep't of Commerce](#), 395 F.3d 1343, 1348 (Fed. Cir. 2005)). Therefore, if a WTO ruling finds that a US law or measure violates a WTO agreement, that ruling does not have direct legal effect in the US.

The USTR, in consultation with various congressional and executive bodies and agencies, determines whether to implement WTO reports and, if implemented, the extent of implementation. US federal courts play no role in determining whether, when, and how to comply with WTO decisions and do not have jurisdiction to adjudicate compliance with adverse WTO dispute resolution proceedings ([Am. Meat Inst. v. U.S. Dep't of Agric.](#), 968 F. Supp. 2d 38, 72 (D.D.C. 2013)).

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