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## Commentaries on World Trade Law Online

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### Article 2 DSU: Administration

(2,380 words)

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#### Article 2 DSU

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panels and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term “Member” as used therein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

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2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the timeframes provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.<sup>1</sup>

*Footnote 1:* The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present to the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

## A. General

<sup>1</sup> Art. 2 establishes the Dispute Settlement Body (DSB) to administrate the DSU.

## B. Historical Development

<sup>2</sup> Under the GATT 1947, the GATT 1947 Council had overall charge of the dispute settlement mechanism. Panels could be established, their reports adopted and retaliation authorized only on the basis of a “**positive**” consensus.<sup>1</sup> The consequential possibility of obstruction by one of the parties to the dispute and the experience with unilateral trade restrictions imposed by the US strengthened the conviction that the dispute settlement procedure required fundamental improvement.<sup>2</sup> During the dispute settlement negotiations of the **Uruguay Round**, the US, Canada, and Mexico supported automaticity of all decisions as a means of expediting the Panel process and avoiding the non-adoption of Panel reports. Other contracting parties, including the EC and Japan, argued that automaticity would minimize the GATT 1947 Council’s role and change the underlying nature of the mechanism.<sup>3</sup> Two compromises were discussed, the “consensus minus two formula” on the one hand, i.e. the maintenance of the principle of “positive” consensus of all contracting parties with the exception of the parties to the dispute, and the introduction of the principle of “reverse” or “negative” consensus on the other hand.<sup>4</sup> In 1989, the **Montreal Rules**<sup>5</sup> paved the way for the second compromise. While

the Montreal Rules introduced the principle of “reverse” or “negative” consensus only for the establishment of Panels, the “Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade”, contained in the **Dunkel Draft**,<sup>6</sup> adopted it for all important stages of the new dispute settlement process, i.e. for the establishment of Panels, for the adoption of Panel and Appellate Body reports, and for the authorization of retaliation.<sup>7</sup>

### C. Composition, Function and Individual Responsibilities of the DSB (Art. 2.1–2.3)

3 In contrast to the other bodies involved in dispute settlement, namely independent, quasi-judicial institutions such as Panels, the Appellate Body, Arbitrators, and expert groups, the DSB is a **political institution**. According to Art. IV:4 WTO Agreement, the DSB is the General Council in a different guise, and consists of the representatives of *all* WTO Members.<sup>8</sup> In exceptional cases, representatives of only some WTO Members are entitled to participate in decisions or actions taken by the DSB. This is the case where disputes arise under one of the Plurilateral Trade Agreements. The last two sentences of Art. 2.1 state that only representatives of WTO Members who are parties to these agreements may participate in decisions or actions taken by the DSB.

4 The function of the DSB is described in the first two sentences of Art. 2.1. The DSB administers the rules and procedures of the DSU. “Accordingly”, as the DSU puts it, it has a number of specific powers, namely to establish Panels, to adopt Panels and Appellate Body reports, to maintain surveillance of implementation of rulings and recommendations, and to authorize suspension of concessions and other obligations under the covered agreements.<sup>9</sup> The use of the word “accordingly” instead of the words “including” or “in particular” suggests that the administering of the rules and procedures of the DSU is limited to these enumerated powers. The DSB has, however, adopted the rules of conduct for Panel members and members of the WTO Secretariat servicing Panels,<sup>10</sup> which do not fall under any of these enumerated powers. Therefore, the power to administer the rules and procedures of the DSU has been interpreted as including the **implied power** to adopt such a decision.<sup>11</sup>

5 Further individual responsibilities of the DSB are laid down in Art. 2.2 and Art. 2.3. According to Art. 2.2, the DSB informs the relevant councils and committees of any developments in disputes relating to their respective agreements.<sup>12</sup> According to Art. 2.3, the DSB meets as often as necessary to comply with the **time-frames** provided for in Art. 16.4 DSU, Art. 17.14 DSU, Art. 20 DSU, Art. 21.3 DSU, and Art. 22.6 DSU. In practice, the DSB meets regularly once per month, but the Director-General may convene additional special meetings

when a WTO Member so requests,<sup>13</sup> and he must do so when regular meetings are not scheduled within the time-frames provided for in Art. 16.5 DSU, Art. 17.14 DSU, and Art. 21.3 DSU.<sup>14</sup>

#### D. Decision-Making in the DSB (Art. 2.4)

6 In general, the DSB takes decisions by “**positive**” consensus. Like footnote 1 of the WTO Agreement, footnote 1 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 the chairperson of the DSB asks whether the decision can be adopted. If no one opposes this, the decision is taken as announced by the chairperson. One opposing WTO Member is enough to prevent the decision being taken.

7 However, when the DSB establishes Panels, adopts Panel and Appellate Body reports, and authorizes retaliation, the DSB, in accordance with Art. 6.1 DSU, Art. 16.4, Art. 17.14 DSU, and Art. 22.6 DSU, takes decisions by “**negative**” or “**reverse**” consensus. This means that the DSB decides to take one of these actions unless there is a consensus not to do so. The decision can only be prevented, if all WTO Members present at the meeting, including the adversarial party in the dispute, oppose it. A “negative” consensus, therefore, is a rather theoretical possibility, and to date has never occurred.<sup>15</sup>

8 The “positive” consensus rule applies in relation to the decisions about appointment of members to the Appellate Body. All Appellate Body appointments have been made only through consensus.<sup>16</sup> When no consensus has been reached, the DSB has been unsuccessful in making appointments.<sup>17</sup> In December 2019, the Appellate Body became inoperational, because of the lack of consensus about the appointment of members.

9 More specifically, according to Art 17.1 DSU, the Appellate Body must be composed of seven persons, three of whom shall serve on any one case. Since 2017, the US opposed appointments to the Appellate Body justifying this with flaws of the WTO dispute settlement system, including (a) the Appellate Body’s judicial activism;<sup>18</sup> (b) the exceeding of the prescribed time limit in deciding an appeal by the Appellate Body;<sup>19</sup> and (c) the continued participation of Appellate Body members after their retirement on the basis of Rule 15 of the Working Procedures of the Appellate Body. Rule 15 of the Working Procedures of the Appellate Body allows members whose terms had expired to finish working on the appeal that they were working on prior to their cession.<sup>20</sup> The US continuously refused (through the positive consensus process) appointments to the Appellate Body until its concerns were addressed. This led to vacancies on the Appellate Body, and, on 11 December 2019, the terms of Thomas R. Graham and Ujal Singh Bhatia came to an end, making Hong Zhao the only Appellate Body member left, and thereby preventing the functioning of the Appellate Body. The impasse created due to lack of positive consensus finally led to the demise of the Appellate Body in

December 2019. Some WTO Members concluded an agreement providing for an interim arbitration mechanism concerning disputes between them that addresses the inoperation of the Appellate Body.<sup>21</sup>

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### Notes

1. *Hudec*, 194; *Porges*, in: *Stewart* (ed.), 63, 70. See for "positive" consensus, para. 6.
2. *Stoll*, *ZaöRV* 54 (1994), 241, 267-268.
3. *Stewart* (ed.), I, 58.
4. *Beise*, 83. See for the principle of "negative" or "reverse" consensus para. 7.
5. Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of the CONTRACTING PARTIES of 12 April 1989, BISD 36S, 61 *et seq.*
6. Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20 December 1991. The Act was named after the then Director-General of GATT, Arthur Dunkel.
7. Arts 4.1, 14.4, 15.14, and 20.3 of the Understanding contained in the Dunkel Draft.
8. See Article IV WTO Agreement.
9. See with regard to the term "covered agreement" Appendix 1 DSU.
10. Dispute Settlement Body, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1, 11 December 1996.
11. *Kuijper*, in: *Kennedy & Southwick* (eds), 81, 87.
12. Similar obligations to inform are contained in Article 3.6 DSU, Art. 4.4 DSU, Art. 8.7 DSU, Art. 25.3 DSU.
13. *Palmeter & Mavroidis*, 15.

14. See footnotes 7, 8, and 11 to the DSU.

15. *WTO*, 26.

16. *Van den Bossche & Zdouc*, 148 and 210; Appointment of James Bacchus, Mr. Christopher Beeby, Said El-Naggar, Claus-Dieter Ehlermann, Florentino Feliciano, Julio Lacarte-Muro and Mitsuo Matsushita, DSB, Minutes of Meeting, [WT/DSB/M/9](#) (1 February 1996), 4, 5 and 7; Appointment of Georges Michel Abi-Saab and A.V Ganesan, DSB, Minutes of Meeting, [WT/DSB/M/78](#) (7 April 2000), 16-22; Reappointment of A.V Ganesan and appointment of Merit E. Janow, DSB, Minutes of Meeting, [WT/DSB/M/157](#) (7 November 2003), 13-14; Appointment of David Unterhalter, Peter Van den Bossche and Ricardo Ramirez-Hernandez, DSB, Minutes of Meeting, [WT/DSB/M/270](#) (28 August 2009), 19-20; Appointment of Baboo Chekitan Servansing, DSB, Minutes of Meeting, [WT/DSB/M/350](#) (21 November 2014), 12-16.

17. See DSB, Minutes of Meeting, [WT/DSB/M/402](#) (24 January 2018), 15-18, DSB, Minutes of Meeting, [WT/DSB/M/403](#) (20 February 2018), 11-19; DSB, Minutes of Meeting, [WT/DSB/M/404](#) (6 March 2018), 17-24; DSB, Minutes of Meeting, [WT/DSB/M/407](#) (22 January 2018), 14-21; DSB, Minutes of Meeting, [WT/DSB/M/409](#) (28 February 2018), pages 11-20; DSB, Minutes of Meeting, [WT/DSB/M/410](#) (27 March 2018), 11-19; DSB, Minutes of Meeting, [WT/DSB/M/412](#) (27 April 2018), pages 16-23; DSB, Minutes of Meeting, [WT/DSB/M/414](#) (22 June 2018), pages 27-32; DSB, Minutes of Meeting, [WT/DSB/M/415](#) (20 July), 8-12; DSB, Minutes of Meeting, [WT/DSB/M/417](#) (27 August 2018), 35-39; DSB, Minutes of Meeting, [WT/DSB/M/419](#) (26 September 2018), 29-34; DSB, Minutes of Meeting, [WT/DSB/M/420](#) (29 October 2018), 42-48; DSB, Minutes of Meeting, [WT/DSB/M/423](#) (18 December 2018), pgs 42-47; DSB, Minutes of Meeting, [WT/DSB/M/425](#) (28 January 2019), 16-20; DSB, Minutes of Meeting, [WT/DSB/M/426](#) (25 February 2019), pages 11-17; DSB, Minutes of Meeting, DSB, Minutes of Meeting, [WT/DSB/M/428](#) (26 April 2019), pages 35-41; DSB, Minutes of Meeting, [WT/DSB/M/429](#) (28 May 2019), 18-24; DSB, Minutes of Meeting, [WT/DSB/M/430](#) (24 June 2019), 14-19; DSB, Minutes of Meeting, [WT/DSB/M/433](#) (15 August 2019), 32-38.

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19. *United States Trade Representative*

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20. *United States Trade Representative,*

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32-37; *Kuijper, L.I.E.I.* 45 (2018), 1.

21. *Multiparty Appeal Arbitration Agreement Pursuant to Article 25 of the DSU, 27 March 2020.* See also *Pauwelyn, JIEL* 22 (2019), 297.

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