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# **WTO DISPUTE SETTLEMENT**

## **GENERAL ASPECTS OF THE WTO DISPUTE SETTLEMENT SYSTEM**

### **AND PARTICIPATION OF ARTICLE XII MEMBERS**

# Objectives



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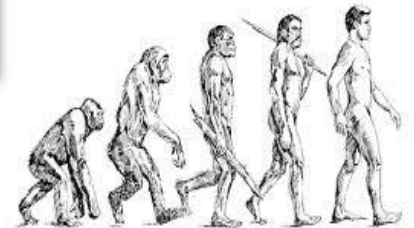
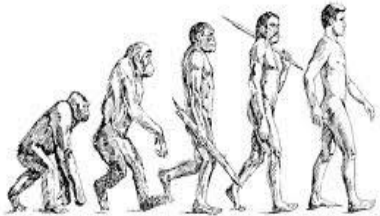
- **To discuss the origin of the WTO DS system (GATT 1947).**
- To describe the basic characteristics of WTO DS.
- To discuss how the WTO DS system works.
- To highlight S & D provisions in WTO DS.
- **To discuss the DS cases involving Accession Protocols.**

# Origin of WTO DS



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## 1947 – 1994



# Origin of WTO DS: GATT 1947

- Articles XXII and XXIII of GATT 1947:
  - ❑ Nullification or impairment
  - ❑ Violation/“non-violation” complaints
- Rule of positive consensus
- Panel reports final – no appellate review :  
132 issued reports/101 adopted reports



# Origin of WTO DS: limitations of GATT 1947

- Rule of positive consensus
  - ❑ Applied in the following situations:
    - ❖ Referring a dispute to a panel
    - ❖ Adopting a panel report
    - ❖ Authorizing countermeasures
  - ❑ Risk of veto
- Diplomatic character of dispute resolution
- No appellate review

# Basic characteristics of WTO

## DS: 1995 – To date



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# Basic characteristics: structure of WTO Agreement



## **Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)**

### **Annex 1**

**1A: MTAs on  
Goods  
(GATT +12)**

**1B: GATS**

**1C: TRIPS**

### **Annex 2**

**Dispute  
Settlement  
Understanding**

### **Annex 3**

**Trade  
Policy  
Review  
Mechanism**

### **Annex 4**

**Plurilateral  
Agreements**

# Basic characteristics: Dispute Settlement Understanding (DSU)



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- Builds on Articles XXII and XXIII of GATT 1947
- Article 3.1, DSU – Members affirm adherence to:
  - ❑ Principles of management of disputes applied under Articles XXII and XXIII GATT 1947; and
  - ❑ Rules and procedures elaborated and modified in DSU.

# Basic characteristics: aims of WTO DS

- Security and predictability in international trade (Article 3.2, DSU)
- Preserving the rights and obligations of Members under the covered agreements (Article 3.2, DSU)
- Clarifying the existing provisions of the covered agreements (Article 3.2, DSU)
- To secure a positive solution to disputes (Article 3.7, DSU)

# Basic Characteristics:

## How are these aims achieved?

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- A mutually agreed solution if possible;
- If not, recourse to panel/Appellate process; or
- Alternative modes of DS

(Article 3.7, DSU)

# Basic Characteristics: Main players in WTO DS

- The parties to a dispute: WTO Members only
- The Dispute Settlement Body (all Members)
- The panel (3 or 5 panelists *ad hoc*)
- Appellate Body (7 Members, permanent body)
- WTO Secretariat (Article 27, DSU)
- AB Secretariat (Article 17.7, DSU)

# Basic Characteristics: Main players in WTO DS



- The Dispute Settlement Body (Article 2, DSU) - administers the WTO DS system:
  - ❑ Establishes panels
  - ❑ Approves appointment of AB Members
  - ❑ Adopts panels and AB reports
  - ❑ Maintains surveillance and implementation
  - ❑ Authorizes retaliatory measures



# Basic characteristics: **mandate of the DSB/application of DSU**

- The rules of the DSU apply to all disputes brought under Agreements listed in Appendix 1 of DSU.
- Referred to as “covered agreements” (Article 1, DSU).

# Basic characteristics: the covered agreements



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## Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)

### Annex 1



**1A: MTAs on  
Goods  
(GATT +12)  
1B: GATS  
1C: TRIPS**

### Annex 2



**Dispute  
Settlement  
Understanding**

### Annex 3



**Trade  
Policy  
Review  
Mechanism**

### Annex 4



**Plurilateral  
Agreements  
(subject to  
decision by  
parties)**

# Basic characteristics: key features of WTO DS – integrated system



- Integrated system of a quasi-judicial nature
- Integrated:
  - ❖ A single set of rules for all disputes (Article 23, DSU)
  - ❖ Special or additional rules in the covered agreements prevail over DSU - Article 1.2 and Appendix 2, DSU
- Quasi-judicial
  - ❖ Judicial system of panel process and appellate review
  - ❖ Political process of DSB adopting reports and making recommendations
  - ❖ Also alternative modes of dispute resolution

# Basic characteristics: key features of WTO DS – quasi-automaticity

- Quasi-automaticity:
  - ❑ Refers to DSB decision-making rule of negative/reverse consensus.
  - ❑ Negative consensus applies to:
    - ❖ Establishment of panels
    - ❖ Adoption of panel and AB reports
    - ❖ Authorization of “retaliation”

# Basic characteristics: key features of WTO DS – compulsory jurisdiction



- Compulsory jurisdiction:
  - ❑ Members obliged to bring disputes under covered agreements to WTO DS system
  - ❑ Acceding Members: consent to accept jurisdiction

# Basic characteristics: key features of WTO DS – **exclusive jurisdiction**

## ➤ Exclusive jurisdiction:

- ☐ No other fora
- ☐ No unilateral action

# Basic characteristics: what's new from GATT to WTO?



- Extension of basic principles of GATT to other areas: services and IP.
- Greater enforceability of rights and obligations because of an improved DS system.

# Basic characteristics: what's new from GATT to WTO? – **improved DS system**

- Improved DS system:
  - ❑ Negative/reverse consensus
  - ❑ Appellate review
  - ❑ Surveillance of implementation
  - ❑ Detailed procedures for formal DS



# How the WTO DS system works



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- Formal litigation
- Alternative dispute resolution

# How the WTO DS system works – formal litigation

## ➤ Main stages of WTO formal DS:

- ☐ Consultation phase
- ☐ Panel proceedings
- ☐ Appellate review
- ☐ Adoption of report(s) by the DSB
- ☐ Implementation

*Good offices,  
conciliation and mediation  
possible at any moment*

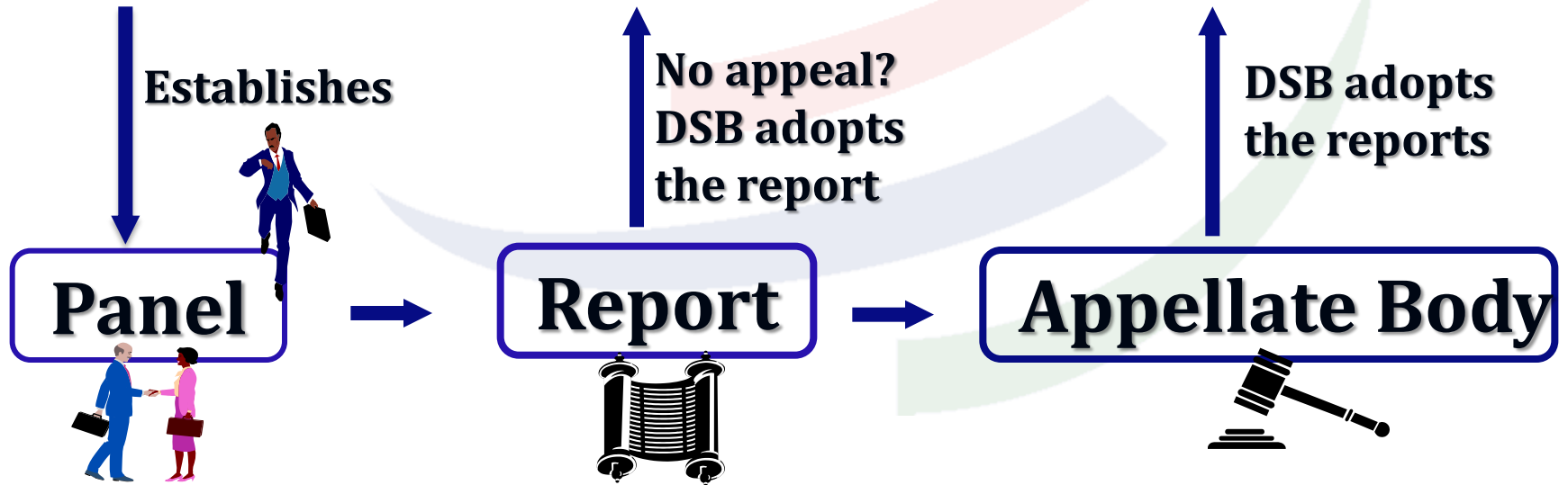


# How the WTO DS system works – formal litigation



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## The DSB – All Members



# How the WTO DS system works – **alternative dispute resolution**

- Good offices, conciliation, mediation:
  - ❑ Article 5, DSU
  - ❑ By agreement of parties
  - ❑ Informal means for parties to reach a mutually acceptable solution
  - ❑ At any time after request for consultations
  - ❑ DG offers good offices

# How the WTO DS system works – **alternative dispute resolution**

- Arbitration:
  - ❑ Article 25, DSU
  - ❑ By agreement of parties
  - ❑ Notification to all Members
  - ❑ Parties agree to abide by arbitration award
  - ❑ Award subject to Articles 21 and 22, DSU (surveillance and implementation)

# S & D Provisions of DSU



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- All stages – particular considerations to special situation of LDCs
- Consultations:
  - ❑ Special attention to particular problems and interests of developing country Members (Article 4.10)
  - ❑ Extending consultation periods (Article 12.10)

# S & D Provisions of DSU



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- Panel composition:
  - ❑ Panelist from developing country Member (Article 8.10)
- Additional legal advice from Secretariat (Article 27.2)
- Right to invoke Decision of 5 April 1966 (Article 3.12)

# Participation of Article XII Members in Dispute settlement\*

- **Complainants: 41 cases**
  - China: 13 cases
  - Panama: 7 cases
  - Chinese Taipei: 6 cases
- **Respondents: 51 cases**
  - China: 35 cases
  - Russian Federation: 6 cases
- **Participation as Third Party: 324 cases**
  - China: 129 cases
  - Chinese Taipei: 91 cases

*Total number of WTO DS cases as of 14 July 2016: 508*



# WTO Accession Protocols cited in the requests for consultations



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Cited in **29** cases, of which **16** following cases proceeded to the Panel or Panel/AB stage:

- **DS339/DS340/DS342: China — Measures Affecting Imports of Automobile Parts**
- **DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products**
- DS379: United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China
- **DS394/DS395/DS398: China — Measures Related to the Exportation of Various Raw Materials**
- DS397: European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China
- DS399: United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China
- DS404: United States — Anti-dumping Measures on Certain Shrimp from Viet Nam
- DS405: European Union — Anti-Dumping Measures on Certain Footwear from China
- **DS431/DS432/DS433: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**
- DS437: United States — Countervailing Duty Measures on Certain Products from China
- DS501: China — Tax Measures Concerning Certain Domestically Produced Aircraft

# DS339/DS340/DS342: China — Measures Affecting Imports of Automobile Parts



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- **Complainants:** US, EC, Canada
- **Timeline:** 2006-2009
- **Measure at issue:**
  - a 25% “charge” imposed by China on imported auto parts “characterized as complete motor vehicles” based on specified criteria, AND
  - administrative procedures associated with the imposition of the charge.

## FINDINGS:

- **Para. 93 of China's Accession Working Party Report:** The Appellate Body reversed the Panel's finding that the measures were inconsistent with China's commitment not to apply a tariff rate exceeding 10% if it created separate tariff lines for CKD and SKD kits. The Appellate Body held that the Panel had erred in construing the measures as imposing an ordinary customs duty, when in the Panel's earlier analysis of the complainants' claims with respect to GATT Art. III, it treated the charge as an internal charge.

# DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products



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- **Complainant:** US
- **Timeline:** 2007-2010
- **Measure at issue:**
  - A series of Chinese measures regulating activities relating to the importation and distribution of certain publications and audiovisual entertainment products.

## **FINDINGS:**

### **China's Accession Protocol (China's trading rights commitments):**

- The Panel found that provisions in China's measures that either limit to wholly State-owned enterprises importation rights regarding, or prohibit foreign-invested enterprises in China from importing, reading materials, AVHE products, sound recordings, and films, were inconsistent with China's obligation, under paras. 1.2 and 5.1 of China's Accession Protocol and paras. 83(d) and 84(a) of China's Accession Working Party Report, to grant the right to trade.

# DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – cont'd



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## FINDINGS (CONT'D):

- The Panel also concluded that several provisions of the Chinese measures at issue breached China's obligation, under para. 1.2 of China's Accession Protocol and para. 84(b) of China's Accession Working Party Report, to grant in a non-discretionary manner the right to trade.
- Certain of these findings, relating to films for theatrical release and unfinished audiovisual products, were appealed.
- The Appellate Body upheld the Panel's findings that the relevant provisions of the measures were subject to, and inconsistent with, China's trading rights commitments under its Accession Protocol and Working Party Report.

# DS394/DS395/DS398: China — Measures Related to the Exportation of Various Raw Materials – cont'd



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- **Complainants:** EU, Mexico, US
- **Timeline:** 2009-2012
- **Measure at issue:**
  - Export restraints imposed on the different raw materials: (i) export duties; (ii) export quotas; (iii) export quotas management (iv) minimum export price requirements; (v) export licensing requirements; and (vi) administration and publication of trade regulations.

- **FINDINGS:**

China's Accession Protocol, para. 11.3 (elimination of export taxes and charges): The Appellate Body upheld the Panel's recommendation that China bring its export duty and export quota measures into conformity with its WTO obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result.

# DS394/DS395/DS398: China — Measures Related to the Exportation of Various Raw Materials



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## FINDINGS (CONT'D):

GATT Art. XX (general exceptions): The Appellate Body upheld the Panel's finding that there is no basis in China's Accession Protocol to allow the application of Art. XX to China's obligations under para.11.3 of the Protocol.

The Panel had concluded that China's export restraints were not justified pursuant to Arts. XX(b) and (g). These findings were not appealed. In this context China only appealed the Panel's interpretation of the phrase "made effective in conjunction with" in Art. XX(g). The Appellate Body concluded that the Panel erred and stated that these terms mean that the export restrictions and the restrictions on domestic consumption or production "must "work together".

# DS431/DS432/DS433: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum



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- **Complainants:** US, EU, Japan
- **Timeline:** 2012-2014 (AB Report adopted in August 2014)
- **Measure at issue:**
  - China's restrictions on the export of various forms of rare earths, tungsten and molybdenum. These restrictions include export duties, export quotas, minimum export price requirements, export licensing requirements and additional requirements and procedures in connection with the administration of the quantitative restrictions.
- **PANEL'S FINDINGS:**
  - "General Exceptions" contained in Article XX of the GATT 1994 are not available to justify a breach of the obligation to eliminate export duties contained in China's Accession Protocol. (para.11.3)
  - China imposes certain restrictions on the right of enterprises to export rare earths and molybdenum. China has committed to eliminating trading restrictions in its Accession Protocol, it argued that the restrictions in question are justified pursuant to Article XX(g). The Panel found that China had not satisfactorily explained why its trading rights restrictions were justified under Article XX.



# DS431/DS432/DS433: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – cont'd



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- **CHINA'S APPEAL:**
- China appealed only limited aspects of the Panel's reasoning and certain intermediate findings.
- According to China, its appeal was intended to obtain clarification of the systemic relationship between specific provisions in China's Accession Protocol, and other WTO agreements, and of the rights of WTO Members to protect and conserve their exhaustible natural resources.
- China appealed an intermediate Panel finding in reaching its conclusion that Article XX of the GATT 1994 is not available to justify a breach of Paragraph 11.3 of China's Accession Protocol. China contended that the Panel erred in rejecting China's interpretation of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement as meaning that each provision of China's Accession Protocol is an integral part of the Marrakesh Agreement or of the Multilateral Trade Agreement to which that provision "intrinsically relates".



# DS431/DS432/DS433: China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – cont'd



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## AB'S FINDINGS:

- **AB declined to accept China's interpretation** of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement.
- AB found that Article XII:1 of the Marrakesh Agreement, while providing the general rule for acceding to the WTO, **does not provide specific guidance on how individual terms of accession relate to the rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements.**
- AB found that Paragraph 1.2 of China's Accession Protocol, which provides that the Protocol “**shall be an integral part of the WTO Agreement**”, **serves to build a bridge between the package of Protocol provisions and the package of existing WTO rights and obligations.** As a result, **the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol form a single package of rights and obligations that must be read together.**
- Yet, such **interpretation does not in itself answer the questions of whether there is an objective link** between an individual provision in China's Accession Protocol and existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreements, or whether China may rely on an exception provided for in those agreements to justify a breach of such Protocol provision. **Such questions must be answered through a thorough analysis of the relevant provisions** on the basis of the customary rules of treaty interpretation and the circumstances of the dispute.

# Questions?

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# THANK YOU!

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