



USAID
FROM THE AMERICAN PEOPLE

Trade Policy Project

SEMINAR ON WTO DISPUTE SETTLEMENT MECHANISM FOR PRIVATE BUSINESS

Presented by: Viktor Dohvan and Marius Bordalba
Ukrainian Chamber of Commerce and Industry - Kiev, 23 June 2015



CONTENTS

1. Introduction (3)
2. Legislative basis (4)
3. WTO Dispute Settlement Mechanism (DSM) (5-40)
4. DSMs in trade agreements of Ukraine (41-53)
5. Use of DSMs by the private sector (54-58)
6. Sources of information (59)



INTRODUCTION

Historical development of DSMs

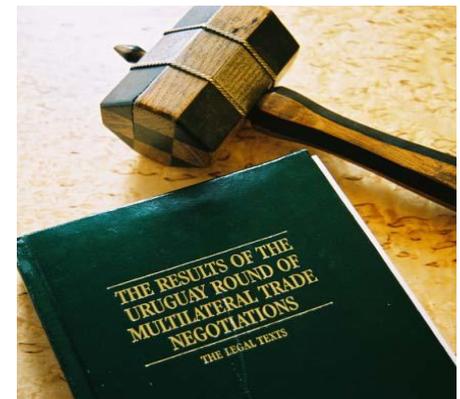
- Dispute Settlement Mechanisms (DSMs) in international public law
- DSMs in the area of international trade: from diplomatic to quasi-judicial systems



LEGAL BASIS

At multilateral level:

- GATT 1994 – Articles XXII-XXIII ([EN-UKR](#))
- Dispute Settlement Understanding (DSU) ([EN-UKR](#))
- Other Agreements, e.g. Articles 4 and 7 of the Agreement on Subsidies and Countervailing Measures ([EN-UKR](#)), Article 17 of the Anti-dumping Agreement ([EN-UKR](#)) etc.

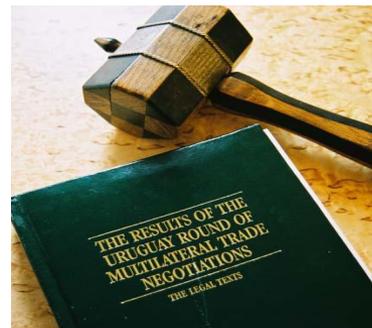




LEGAL BASIS

At regional/bilateral level:

- There are provisions on dispute settlement in each regional/bilateral trade agreement in which Ukraine is part
- Examples: Article 19 of the Agreement on the Free Trade Zone or Article 14 of the FTA between Russia and Ukraine





WTO DSM

Aim

“To secure a “positive solution” to the dispute” (Art. 3.7 DSU)

- Preferred outcome:
 - To reach a mutually agreed solution
- If not,
 - Panel Proceeding
 - [....and AB review.]
 - [Or Article 25 DSU Arbitration?]



Functions

- Providing security and predictability to the multilateral trading system
- Preserving the rights and obligations of Members under the CA
- Clarification of rights and obligations through interpretation
- Prompt settlement of disputes



WTO DSM

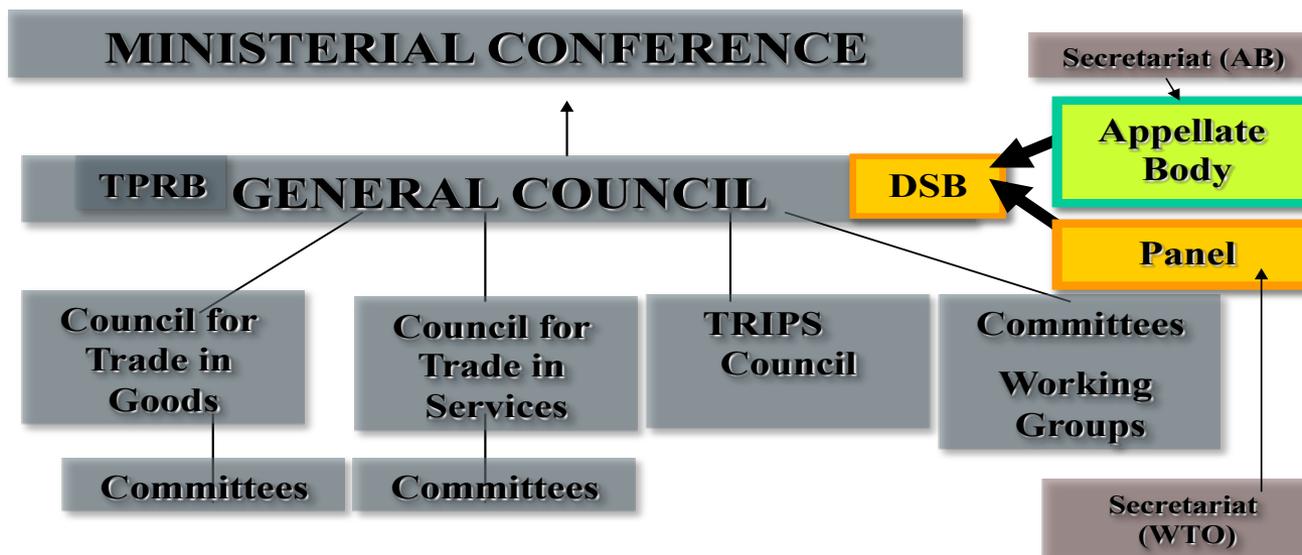
Additional features

- The DSM as a tool that **dissuades** Members to act inconsistently
- If a violation is proven, the complainant does **not** need to show separately that it causes nullification or impairment
- Unilateral actions are **prohibited**
- WTO DSM: **Compulsory and exclusive jurisdiction** for violations of WTO obligations
- **Prospective** effect of WTO rulings



WTO DSM

Participants - DSB





Other participants

- The Parties (complainant, defendant & third parties): WTO Members only
- The panel (3 or 5 panellists)
- Experts
- Appellate Body (7 members)
- WTO Secretariat
- Role of non-governmental actors



WTO DSM

Main types of legal complaints

- Violation complaints
 - The complainant alleges a violation of a WTO provision
- Non-violation complaints
 - The complainant alleges that the defendant, through WTO-consistent behaviour, nullifies/impairs benefits from trade liberalisation



Challengeable measures

- Against what can the complaint be directed?
 - In principle, the WTO DSM applies to “public” acts only (law, decrees, regulations etc.)
 - But private actions may be examined if there is “sufficient government involvement with it”, or when WTO Agreements contemplate it
 - Actions and inactions
 - Mandatory vs. discretionary legislation
 - Sub-central government acts
 - Legislation not yet in force



WTO DSM

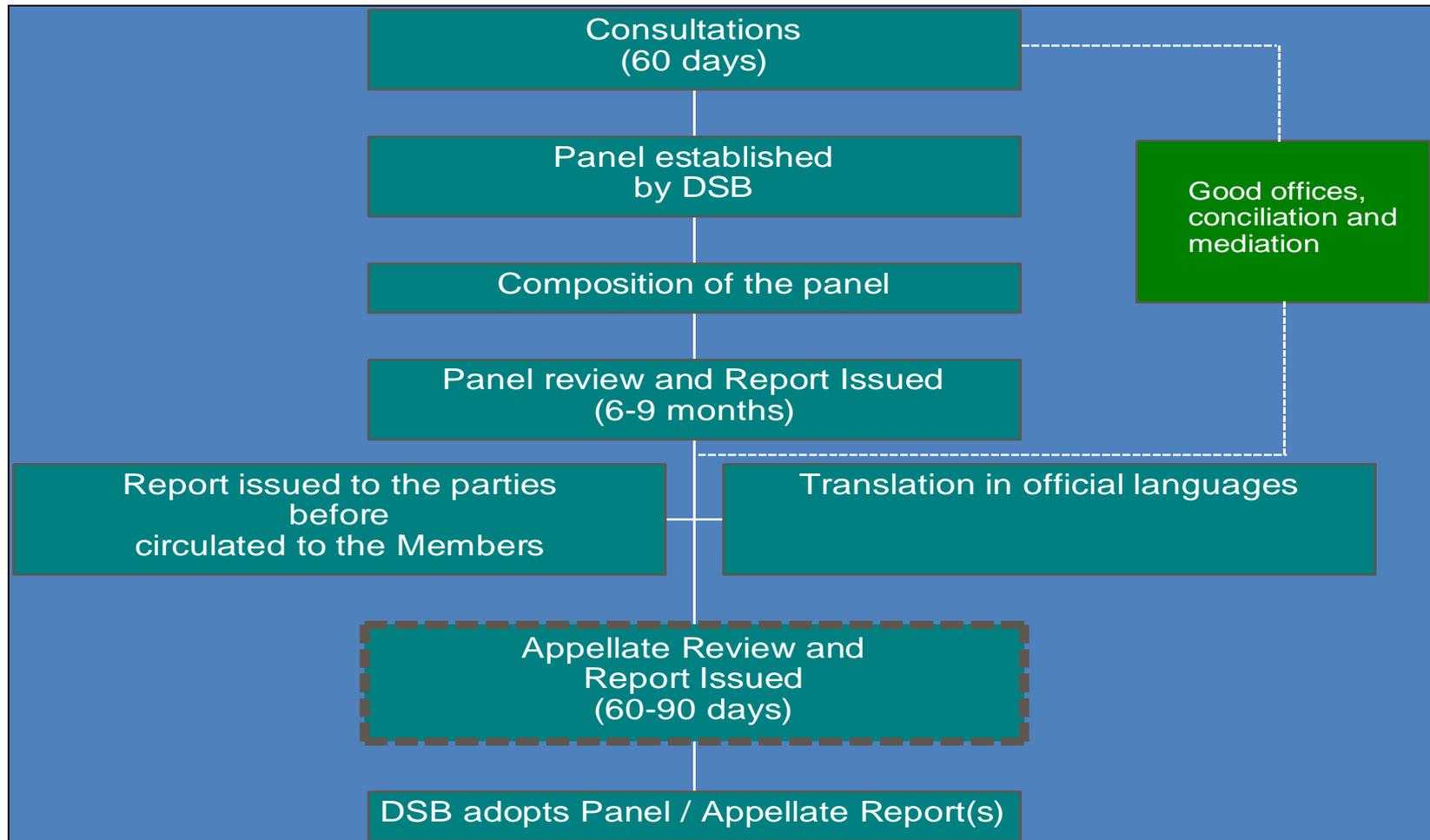
Precedent value

- Panels and the AB produce reports, **not** judgements
 - They have to be adopted by the DSB to have any legal value
- Adopted reports do **not** create binding precedents
 - Only Members can adopt authoritative interpretations
 - However, panels tend to follow previous findings especially those from the AB



WTO DSM

Main stages





USAID
FROM THE AMERICAN PEOPLE

60 days
by 2nd DSB meeting

WTO DSM

Stages in detail:

0-20 days
20 days (+10 if Director-General asked to compose the panel)

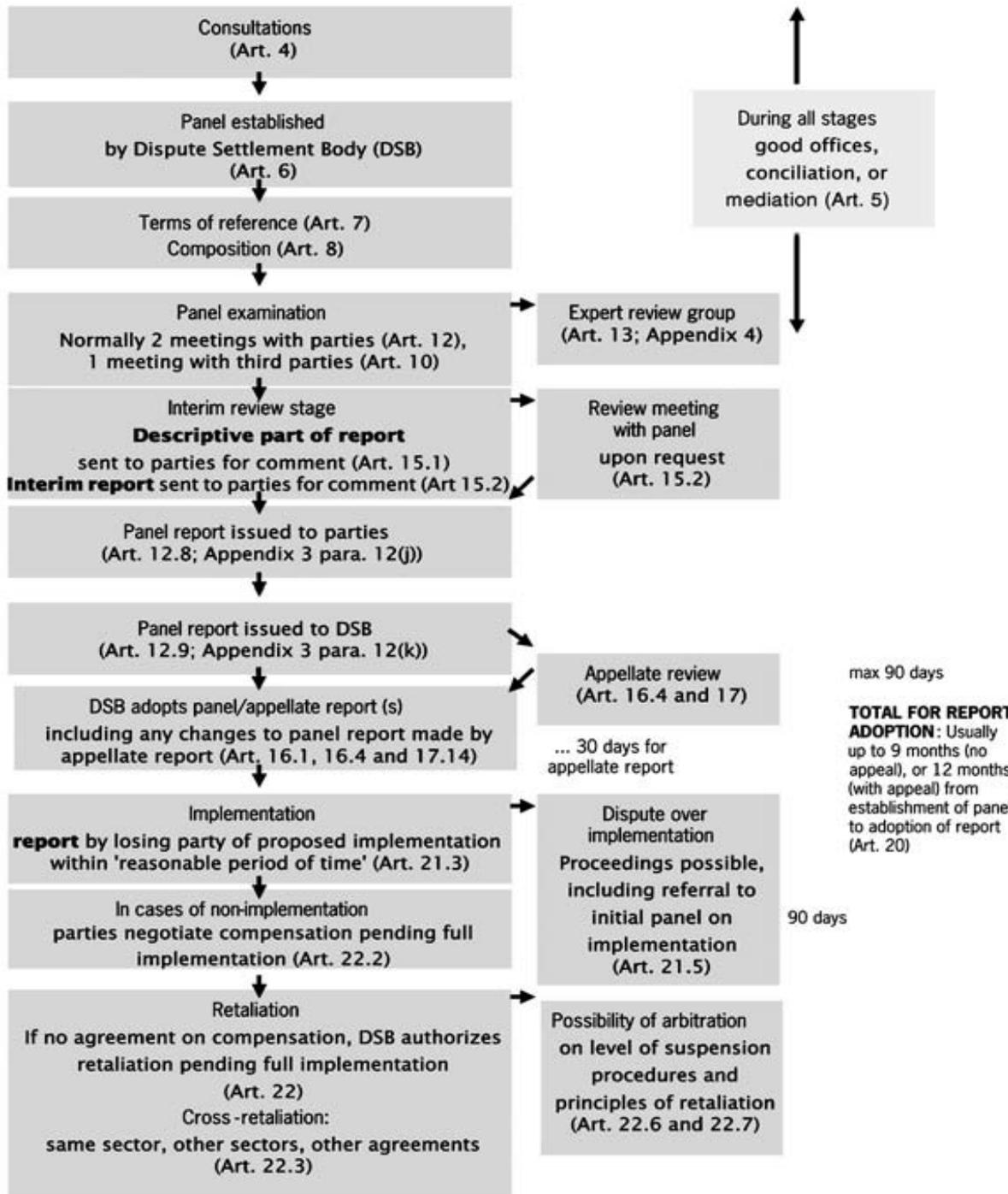
6 months from panel's composition, 3 months if urgent

up to 9 months from panel's establishment

60 days for panel report unless appealed ...

'REASONABLE PERIOD OF TIME':
determined by:
Member proposes, DSB agrees; or parties in dispute agree; or arbitrator

30 days after 'reasonable period' expires



Source: [“A Handbook on the WTO Dispute Settlement System”](#)



Consultations

- Request made by one or more Members to another Member
- **Confidential** process among the parties
- “attempt to obtain a satisfactory adjustment of the matter”



Consultations

- Request must be presented **in writing**
- Indicate reasons for the request:
 - identification of the measures
 - legal basis for complaint
- Addressed to the Member concerned, copied to DSB and relevant Councils and Committees
- Circulated to Members (WT/DS.../1)



Consultations

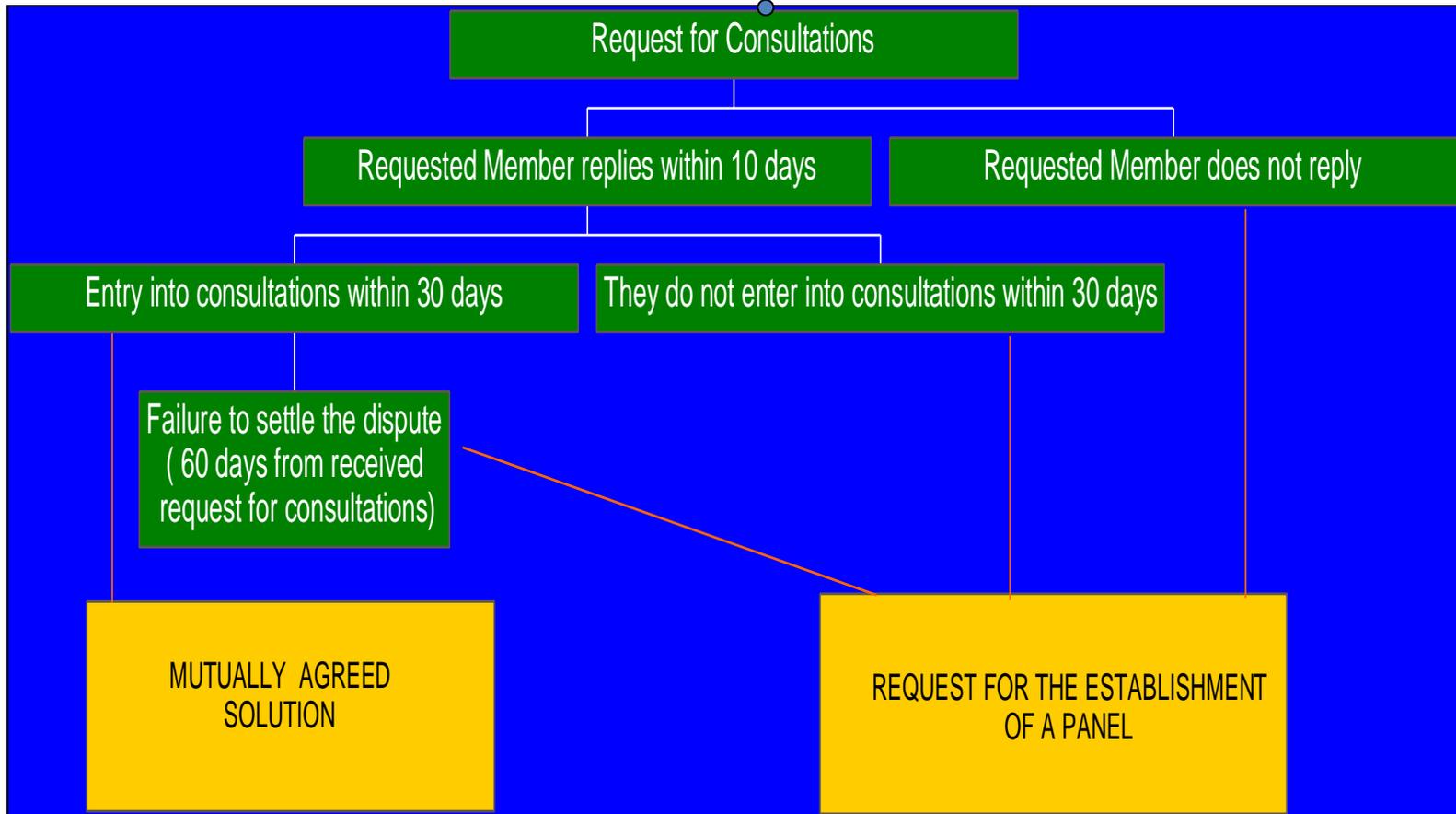
- Request must be responded within **10 days**; consultations must be entered in good faith within **30 days**
- If consultations succeed in resolving the matter:
 - notification of mutually agreed solution
- **If consultations fail to resolve the matter after 60 days**
- Right to request the establishment of a panel
 - (But see: Urgency procedure under DSU Art. 4.8)



WTO DSM

Consultations

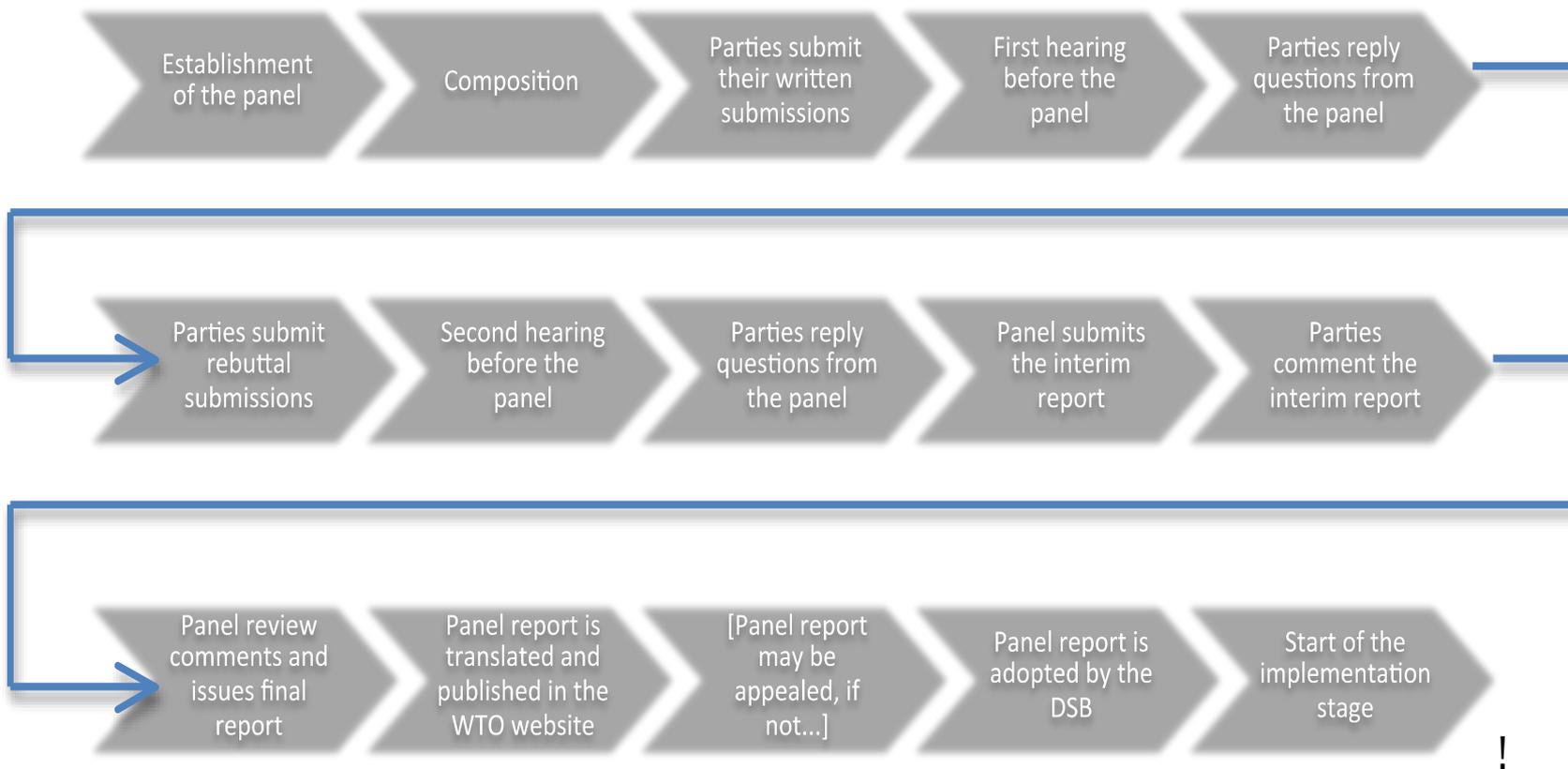
Exception:
Urgency
procedure





WTO DSM

Panel procedure



!



Request for establishment

- Request must be submitted in writing and indicate whether consultations were held
- Content of the request:
 - Identify the specific **measures** at issue
 - Present a brief summary of the legal basis (**claims**)
- Establishment of the panel by reverse consensus (at second DSB meeting)



Panel's terms of reference

- Terms of reference establish the panel's jurisdiction
 - Standard ToRs
- Matter referred to a panel consists of:
 - The **claims** and the **measures** at issue



WTO DSM

Panel composition

- “well-qualified government and/or non-governmental individuals”
 - No nationals of parties or third parties (unless parties agree)
 - rules of conduct
- Secretariat proposals
 - Indicative list of panellists
 - “Compelling reasons” for rejection
- If no agreement: nomination by DG upon request of either party





Third parties

- Members having a **substantial interest** may participate in a dispute
- They have the right to receive the first written submission of the parties, make a written submission and to participate in the first hearing
- Additional rights may be conferred to them

Ukraine has reserved third party rights in 4 cases concerning the Tobacco Plain Packaging Act of Australia; in 3 trade defence cases (anti-dumping and safeguards); and in 2 cases concerning general GATT, investment measures and customs valuation matters. In 4 cases, the Russian Federation is one of the parties to the dispute



Panel's function

- A panel should make an **objective assessment of the matter before it**, including an objective assessment of:
 - the **facts** of the case
 - the **applicability** of the relevant covered agreements
 - **conformity with the relevant covered agreements**
- Special rules in AD Agreement (Art. 17.6)



Panel's work

- Successive written and oral phases
 - Organization meeting and working procedures
 - First submissions
 - First substantive meeting and questions
 - Concurrent rebuttals
 - Second meeting and additional questions





Panel's reports

- The interim report – Interim review stage
 - Circulation of descriptive part
 - Circulation of “interim report”
 - Parties’ written request for review
 - Interim review meeting upon request
- Final report is issued to the parties
- Report is translated and placed in the website



Content of the panel report

- The panel's final report should contain:
 - Findings of fact
 - Applicability of relevant provisions
 - Rationale behind findings and recommendations
- Structured in two parts:
 - Descriptive part (factual findings and parties' arguments)
 - Findings and conclusions



Timeframe

- General rule: **6 months** from composition / terms of reference to issuance of final report to parties (Art. 12.8 DSU)
 -Unless the panel cannot
- General rule: **9 months** from establishment of panel to consideration of report for adoption (if no appeal)



WTO DSM

Appeals – Main features

- Standing Appellate Body, appointed by the DSB
 - Supported by a Secretariat
- 7 members / Unaffiliated with any government
- Appeal only available on issues of law and legal interpretations
- Appeal only open to parties in dispute
- Divisions of 3 Members
- Collegiality (Exchange of Views)
- Confidentiality
- Strict Time Frame





Outcome of appeal

- What can the Appellate Body do?
 - Findings and Conclusions (Recommendation)
 - **Uphold, modify or reverse** findings and conclusions of panels
 - No remand authority, but may “complete the legal analysis”



Recommendations

- **If violation:**
 - Member must **bring its measures into conformity** – Losing Member's decision how to do it
 - Special situations (e.g. Arts. 4 and 7 ASCM)
- **If no violation, but nullification or impairment:**
 - Mutually satisfactory adjustment



Adoption of reports

- Adoption of panel reports
 - Consideration by Members, not before **20 days** after circulation
 - Adoption within **60 days**, unless **negative consensus**
- Adoption of panel reports when appealed
 - Appellate Body *and* panel report are adopted by negative consensus



WTO DSM

Implementation

- Within **30 days** of adoption of report:
 - Member concerned informs the DSB of its intentions in respect of implementation of the recommendations and rulings
- **Preferably, immediate compliance**
- If necessary: Determination of “**reasonable period of time**” for implementation:
 - proposed by Member and approved by the DSB;
 - mutually agreed by the parties; or,
 - determined through **arbitration**. Guideline: 15 months from date of adoption



WTO DSM

Assessment of compliance

- **Is the determination properly implemented?**
- If there is disagreement:
 - **Compliance panel** (original panel preferred)
 - Recourse to “these dispute settlement procedures”
 - Circulation of the report: 90 days
 - Appeal possible
 - No more “reasonable period of time”



WTO DSM

Non-implementation: Compensation

- **Compensation**
 - Voluntary / Negotiated
 - Temporary, until compliance
 - Compatible with WTO Agreements
- If no compensation agreed within **20 days** after expiry of reasonable period of time...
 - Affected Member may request **“Suspension of concessions” (next slides)**



WTO DSM

Non-implementation: Retaliation

- **Request for authorization must:**
 - **Specify the Agreement and sector(s) under which it will be applied.**
 - *In the order given by Art. 22.3 DSU*
 - **Set out a specific level of suspension**
 - *Equivalent to nullification and impairment*
 - *Special rules, e.g. Arts. 4.10 and 7.9 ASCM*



WTO DSM

Non-implementation: Retaliation

- Principle: level of suspension must be **equivalent to nullification or impairment**
 - **Equivalence:** correspondence, identity or balance
- “Level of concessions to be suspended” **must be equivalent to** “level of nullification or impairment”



WTO DSM

Non-implementation: Retaliation

- Arbitration on:
 - Level of suspension or on principles of Art. 22.3 DSU
- The arbitrator may **not** review the nature of the proposed measure
- Arbitral award: within 60 days of expiry of the reasonable period of time



WTO DSM

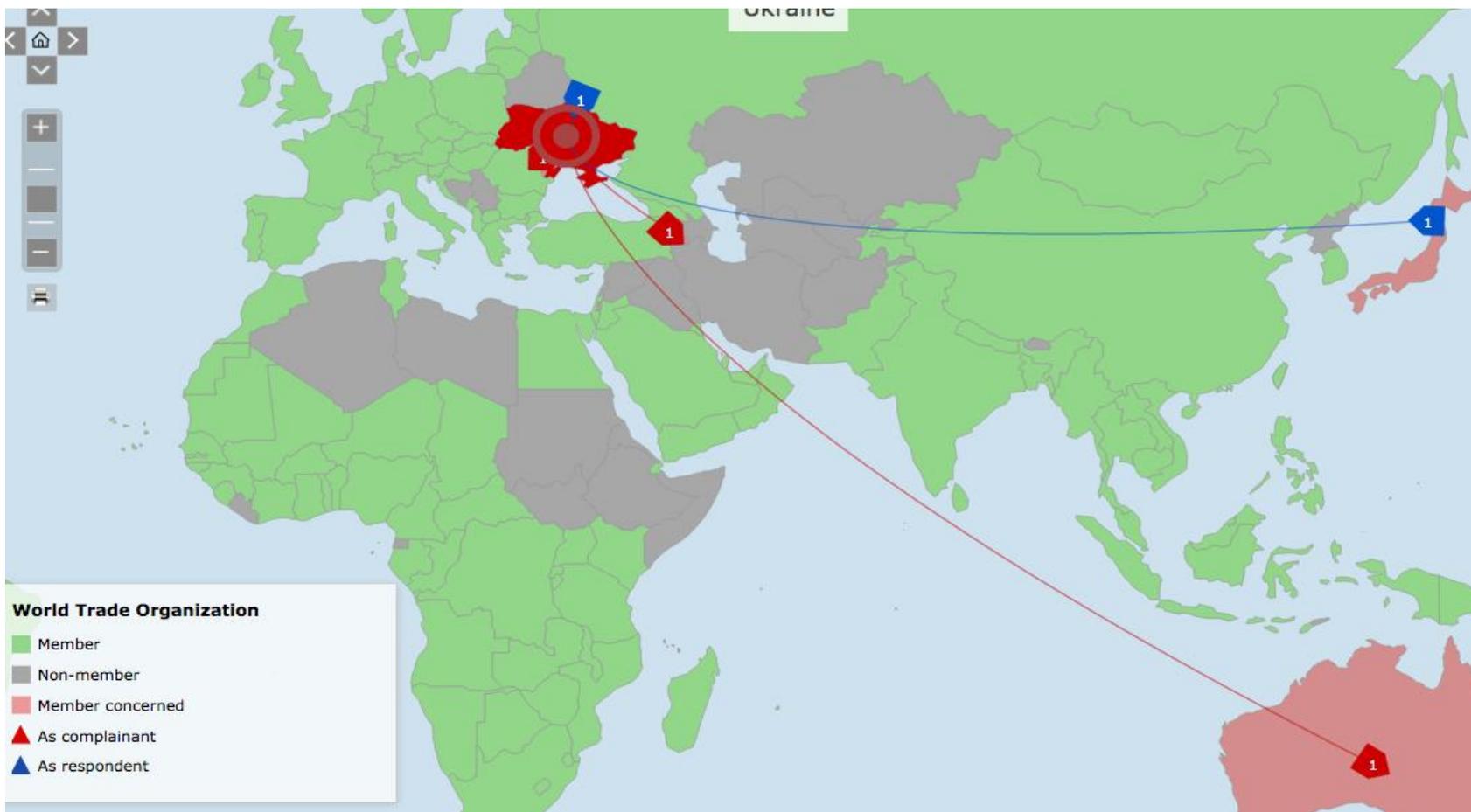
Alternative Dispute Resolution

- Members have the option to resorting to good offices, conciliation or mediation
- Director General of the WTO may act as conciliator or mediator – EC vs Philippines & Thailand case
- Arbitration, instead of panel litigation, is also contemplated in the WTO DSU
- Use of the ADR mechanisms is very limited in the WTO



UKRAINE AND DSMs

Experience in the WTO DSM





UKRAINE AND DSMs

Institutional framework

- MEDT is the main institution in charge of representing the interests of the Govt. of Ukraine in international trade disputes. Competences:
 - ✓ Preparation of a case, including defining the strategy
 - ✓ Drafting of all documents to be submitted and participation in the hearings before panels and the Appellate Body
 - ✓ Coordination and cooperation with other Departments of the MEDT and line ministries
 - ✓ Hiring of external assistance
 - ✓ Participation in meetings of the Dispute Settlement Body
- Other institutions involved: Ministry of Foreign Affairs and line Ministries (Ministry of Agrarian Policy and Food, Ministry of Finance, State Customs Service etc.)



UKRAINE AND DSMs

- 494 requests for consultations (RfC) (until 30 May 2015)
- 156 panel reports published, covering approx. 200 disputes (until October 2014)
- 129 Appellate Body reports
- Continued prevalence of trade remedies (2015: 5 out of 6 RfC are related to trade defence instruments/subsidies; 2014: 7 out of 14); also several SPS-related cases
- Main Members involved (2014-2015): EU-10, IDN-7, RUS-6, US-5, CHN-3, **UKR-1**
- Panels established/composed (2014-2015): 11/6
- MAS (2014-2015): 1



UKRAINE AND DSMs

Experience in the WTO DSM

- In 3 cases Ukraine has acted as complainant; in 1 case, Ukraine has requested the establishment of a panel; panel suspension requested
- In 3 cases Ukraine has been complained against; in 1 case a panel has been established to examine a safeguard measure; the panel report will be published in June 2015
- In 9 cases, Ukraine has reserved third party rights; in 4 cases it has intervened
- In at least 1 case, a satisfactory solution could be reached through the consultations
- And the future?



DISPUTES INVOLVING UKRAINE

DS 411 (2010) - Ukraine vs. Armenia

- Title: Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages
- Measures:
 - Armenia's law “On Presumptive Tax for Tobacco Products” of 24 March 2000. Claims:
 - Article III: Armenia levies discriminatory internal taxes on imported tobacco products,
 - Article II: The law imposes customs duties on such imported tobacco products at a rate of 24 per cent, which is higher than Armenia's WTO bound rate of 15 per cent;
 - Law “On Excise Tax” of 7 July 2000. Claim:
 - Article III: applies higher excise taxes on imported alcoholic beverages than on like domestic products



DISPUTES INVOLVING UKRAINE

DS 421 (2011) - Ukraine vs. Moldova

- Title: Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge)
- Measures:
 - Law “On Charge for Contamination of Environment” of 25 February 1998 which imposes two types of charges on imported products only: (i) a charge on imported products, the use of which contaminates the environment, at 0.5-5 per cent of the customs value of imported products; and (ii) a charge on plastic or “tetra-pack” packages that contain products (except for dairy produce) at MDL 0.80-3.00 per package
- Claims:
 - Violations of Article III GATT: Like domestic products are not subject to the first type of charge, while packages containing domestically produced like products are not subject to the second type of charge



DISPUTES INVOLVING UKRAINE

DS 423 (2011) – Moldova vs. Ukraine

- Title: Taxes on distilled spirits
- Measures:
 - Law No. 178 of 1996
- Claims:
 - Violations of Article III GATT: Ukraine applies a tax rate to domestic products that is lower than that applied on certain like (and other directly competitive or substitutable) imported distilled spirits from Moldova



DISPUTES INVOLVING UKRAINE

DS 434 (2012) - Ukraine vs. Australia

- Title: Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
- Measures:
 - Australia's Tobacco Plain Packaging Act 2011 and its implementing Tobacco Plain Packaging Regulations 2011
 - The Trade Marks Amendment (Tobacco Plain Packaging) Act 2011
- Claims:
 - Breaches of several provisions of TRIPs agreement
 - Breach of Art. 2.2 ATBT because the measure constitutes an unnecessary obstacle to trade and is more trade restrictive than necessary to achieve the stated health objectives
 - Breach Art. III GATT – 2.1 ATBT – Competitive opportunities



DISPUTES INVOLVING UKRAINE

DS 468 (2013) – Japan vs. Ukraine

- Title: Ukraine – Definitive safeguard measures on certain passenger cars
- Measure:
 - Decision imposing safeguard measures on imports of certain cars
- Claims:
 - Violation of Article II and XIX of the GATT
 - Breaches of multiple substantive and procedural provisions of the Safeguards agreement



DISPUTES INVOLVING UKRAINE

DS 493 (2015) – Russia vs. Ukraine

- Title: Ukraine – Anti-Dumping Measures on Ammonium Nitrate
- Measure:
 - Decision extending the application of anti-dumping measures on imports of ammonium nitrate
- Claims:
 - Violations of several provisions of the AD Agreement and VI of the GATT
 - Alleged breaches of multiple substantive (e.g. dumping determination) and procedural provisions of the AD Agreement



DISPUTES INVOLVING CIS COUNTRIES

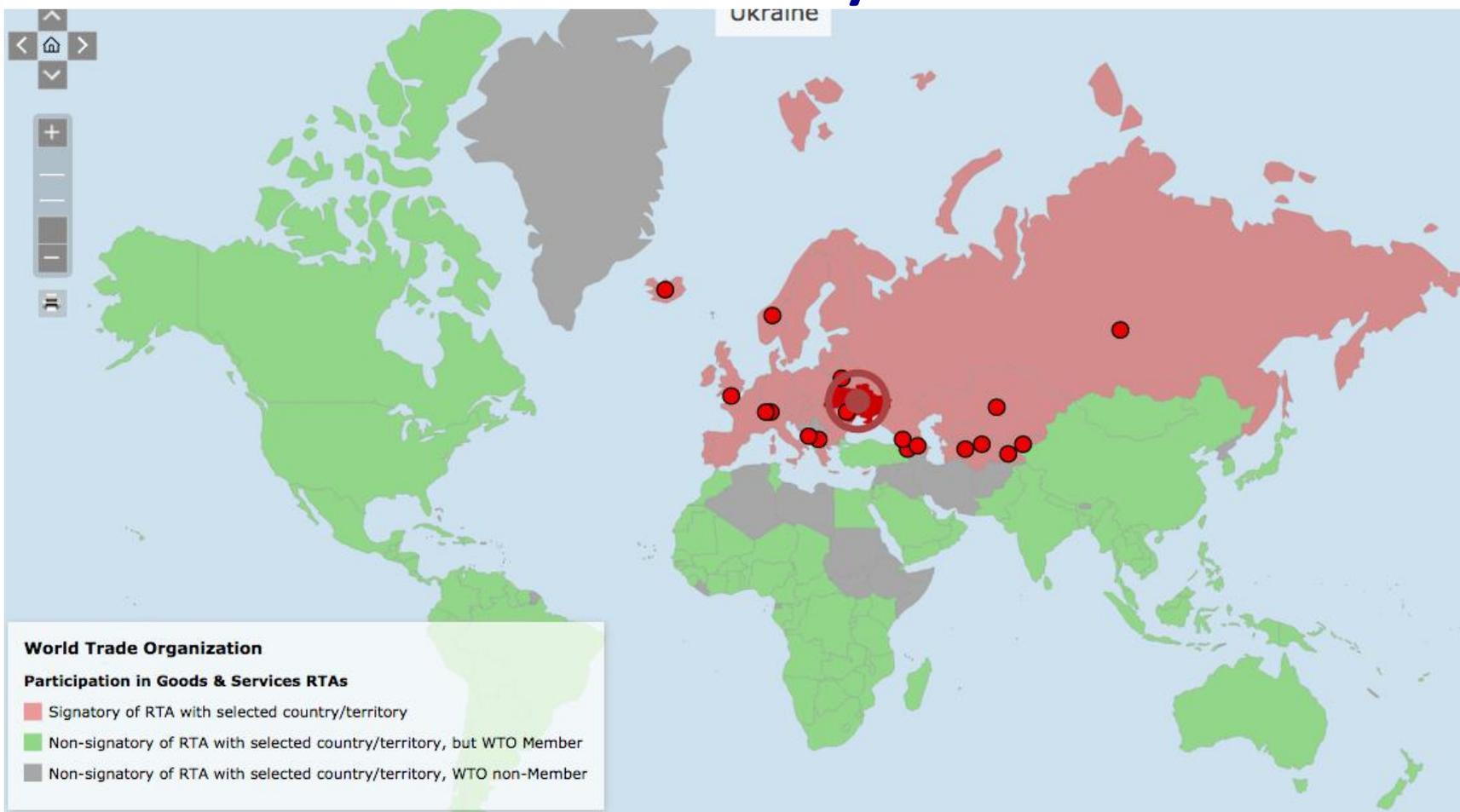
Summary situation:

- Russia: The most active player:
 - 4 cases as a complainant; 5 cases as a respondent; 21 cases as third party
 - 2 panels active; 3 panels established; no MAS notified
 - Agreements involved: AD, GATT, SPS & TRIMs
- Ukraine: Also an active player:
 - 3 cases as complainant; 3 as a respondent; 9 as a third party
 - One panel active; no MAS notified
 - Agreements involved: GATT, AD, Safeguards, TBT & TRIPs
- Moldova: 1 case as complainant; 1 as a respondent
- Armenia: Respondent in 1 case
- Three countries have not been active at all: Kyrgyzstan, Georgia and Tajikistan



UKRAINE AND DSMs

RTAs notified by Ukraine





UKRAINE AND DSMs

RTAs with DSMs

- Agreement on the Free Trade Area (ratified by Kazakhstan, Belarus, Russia, Ukraine, Armenia, and Moldova)
 - ✓ Disputes should be settled through the Economic Court of the CIS or panels established under the dispute settlement provisions of the FTA
- Bilateral agreements:
 - ✓ Diplomatic resolution mechanisms are contemplated in the old ones e.g. Ukraine-Russia FTA
 - ✓ Quasi-judicial DSMs have been included in the newer ones, based on the WTO DSM e.g. Ukraine-Montenegro FTA



PRIVATE SECTOR AND REVIEW OF TRADE MEASURES

Review through domestic systems

- Well-functioning **domestic judicial systems** are required by various WTO agreements
 - ✓ Access to these systems must be open to the private sector: domestic industry, importers, exporters and consumers
 - ✓ Closest manner to assert rights
 - ✓ Lower costs than international disputes
 - ✓ May allow retroactive decisions and in some cases compensation
 - ✓ Learning experience for using international DSMs
- What is the experience in using internal review mechanisms in Ukraine?



PRIVATE SECTOR AND REVIEW OF TRADE MEASURES

Review through supranational systems

- Certain DSMs are open to the private sector.

Example: EU Court of Justice

- ✓ Only certain parties may launch a case
- ✓ These are quasi-judicial mechanisms, with two levels (first instance and appeal)
- ✓ Independent resolution mechanism
- ✓ Length of proceedings
- ✓ Level of deference towards the investigating authority reduces the chances to win
- ✓ Retroactivity / Compensation?



PRIVATE SECTOR AND REVIEW OF TRADE MEASURES

Review through supranational systems

- Example of challenging a measure in the EU
 - ✓ Anti-dumping measures imposed on imports of seamless pipes (classified under CN 7304) from Ukraine
 - ✓ Interpipe, the largest producer, challenged certain aspects of the European Commission determination
 - ✓ The General Court and the Court of Justice determined some violations in the calculation of the dumping margin
 - ✓ The Commission recalculated the dumping margin, lowering it from 25.1 to 17.7%
 - ✓ Since 2012, when the lower duties are applied, exports of goods classified under CN 7304 increased from 56467 to 86326 metric tons



PRIVATE SECTOR AND REVIEW OF TRADE MEASURES

Review through supranational systems

- Most DSMs are open only to Members
- So, which is the role of the private sector? It
 - ✓ Must convince the Government why a case should be brought to the WTO/FTA DSM
 - ✓ Must actively support the Government throughout the dispute, by providing all background information regarding the challenged measure
 - ✓ May have to hire its own advisors to analyse the facts in light of the international obligations and feed the Government with analysis and positions
- Normally, no retroactivity and no compensation
- Power to coerce the losing party is less developed



PRIVATE SECTOR AND REVIEW OF TRADE MEASURES

Review through supranational systems

- Cost of using the WTO DSM
 - ✓ In many countries, the private sector is required to bear some or a large portion of the costs
 - ✓ Cost/benefit analysis is required
- Better knowledge of the DSMs should permit to identify the cases where chances to win are higher and reduce the costs of outside assistance



SOURCES OF INFORMATION

- Webpage dedicated to [dispute settlement](#)
- Dispute Settlement Understanding ([English](#)) ([Ukrainian](#), unofficial version)
- Updated [list of disputes](#)
- Disputes by [WTO agreement](#)
- [Map of disputes](#) between WTO Members
- Course online on [WTO dispute settlement](#)
- [WTO Analytical Index](#)
- [Appellate Body Repertory of Reports and Awards](#)
- [Video about the WTO dispute settlement mechanism](#)
- “Case studies of WTO dispute settlement”



USAID
FROM THE AMERICAN PEOPLE

Trade Policy Project

CONTACT DETAILS

UKRAINE TRADE POLICY PROJECT

Chief of Party: Farhat Y. Farhat

Deputy COP: Sergey Nerpii

Presenters:

Ms. Anna Gladshstein – anna.gladshstein@gmail.com

Mr. Marius Bordalba –

mbordalba@internationaldevelopmentgroup.com