



**USAID** | **UKRAINE**  
FROM THE AMERICAN PEOPLE

# TRADE POLICY PROJECT (TPP)

Dispute Settlement Guideline for private sector  
(DRAFT)

\_\_\_\_\_, 2016

This publication was produced by International Development Group LLC, for review by the United States Agency for International Development.

# TABLE OF CONTENTS

1	INTRODUCTION.....	1
2	DISPUTE SETTLEMENT MECHANISMS: HISTORICAL DEVELOPMENT AND WHY ARE THEY NEEDED.....	1
3	THE WTO DISPUTE SETTLEMENT MECHANISM – REGULATION; FUNCTIONS, OBJECTIVES AND KEY FEATURES; BODIES AND PARTIES .....	2
3.1	Where is the Dispute Settlement Mechanism regulated?.....	2
3.2	Functions, objectives and key features .....	3
3.3	WTO bodies involved in the DSM.....	5
3.4	The parties in a dispute.....	6
4	THE WTO DISPUTE SETTLEMENT MECHANISM – THE PROCEDURE IN-DEPTH .....	8
4.1	Diagram of the main stages in a WTO dispute settlement proceeding.....	8
4.2	Consultations .....	8
4.3	Panel .....	9
4.4	Appellate Body.....	14
4.5	What can panels or the Appellate Body do if they find that a measure examined is inconsistent with the WTO agreements? .....	14
4.6	Adoption of panel/Appellate Body reports .....	15
4.7	Reasonable period of time to comply.....	15
4.8	Procedure to assess compliance.....	15
4.9	Non-implementation: compensation or suspension of concessions (retaliation) .....	16
4.10	Conciliation, mediation, good offices and arbitration .....	17
5	UKRAINE AND INTERNATIONAL TRADE DISPUTE SETTLEMENT MECHANISMS.....	17
5.1	Dispute settlement in international trade agreements signed by Ukraine .....	17
5.2	Stakeholders involved in international trade disputes .....	23
6	THE PRIVATE SECTOR AND THE REVIEW OF TRADE-RELATED MEASURES .....	25

6.1	The preconditions .....	25
6.2	The private sector and domestic judicial review .....	27
6.3	The private sector and supranational judicial review of trade-related measures.....	28
7	IMPORTANT CONTACT DETAILS.....	29
7.1	Governmental authorities .....	29
7.2	Business associations .....	30
8	FURTHER READING.....	31

## ACRONYMS

ACRONYM	MEANING
AB	Appellate Body
CIS	Commonwealth of Independent States
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
EC	European Community
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Center for the Settlement of Investment Disputes
MEDT	Ministry of Economic Development and Trade
MFN	Most-Favoured Nation
MT	Metric Tonne
NGOs	Non-Governmental Organisations
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
UN	United Nations
US	United States
USAID	United States Agency for International Development
USD	United States Dollars
WTO	World Trade Organization
WTO DSU	WTO Agreement Dispute Settlement Understanding

## **1 INTRODUCTION**

These Guidelines aim at introducing the reader to instruments for resolving disputes in the trade area, with special emphasis on the WTO Dispute Settlement Mechanism (DSM). The DSM is the main instrument to compel WTO Members to act consistently with the rules contained in the WTO agreements. Almost 500 disputes have been filed in the WTO since 1995, with approximately 210 leading to panel/Appellate Body determinations. Approximately, 60 cases are currently active. In many of the remaining disputes, parties appear to have been able to resolve their differences “out-of-court”. The WTO DSM has thus played a very important role in resolving many disputes and in persuading Members to behave in accordance with WTO obligations.

After a brief introduction in Chapter 2, this brochure presents the provisions that rule WTO disputes. Those provisions are contained in the WTO Dispute Settlement Understanding and are explained in Chapters 3 and 4 below. Chapter 5 presents the dispute settlement provisions of international trade agreements to which Ukraine is party. Chapter 6 addresses how the private sector can use the review mechanisms, whether judicial review before national courts or under the mechanisms contemplated in international agreements. Chapters 7 and 8 contain important contact details and further reading materials in this area.

This brochure has been prepared by Mr. Marius Bordalba, expert of the Ukraine Trade Policy Program, for the Ministry of Economic Development and Trade of Ukraine. The Program is financed by the United States Agency for International Development (USAID).

## **2 DISPUTE SETTLEMENT MECHANISMS: HISTORICAL DEVELOPMENT AND WHY ARE THEY NEEDED**

International dispute settlement is as old as international relations. As recognised in the UN Charter, negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement, are some of the methods for peaceful settlement of international disputes.

Mediation was known in ancient India and in the Islamic world. Numerous examples of arbitration are found in ancient Greece, in China, among the Arabian tribes, in maritime customary law in medieval Europe and in Papal practice. More recently, an institutionalized dispute settlement mechanism was included within the system of the League of Nations (Permanent Court of International Justice).



In the trade area, the GATT 1947 contained Articles XXII, regarding consultations, and XXIII, on actions in case that the issue was not solved through consultations. These rules were developed further during the 60s and 70s. Based on the experience of using the GATT dispute settlement for almost 50 years, the current WTO Dispute Settlement Understanding was developed during the Uruguay Round.

In multilateral (e.g. the WTO), regional (e.g. the Treaty on a Free Trade Area between members of the Commonwealth of Independent States (CIS) and the Common Economic Zone) or bilateral international trade agreements (e.g. the bilateral free trade agreement between Ukraine and Georgia), dispute settlement mechanisms are nowadays the most frequently used peaceful means to compel parties to behave consistently with the obligations undertaken under those agreements.

### **3 THE WTO DISPUTE SETTLEMENT MECHANISM – REGULATION; FUNCTIONS, OBJECTIVES AND KEY FEATURES; BODIES AND PARTIES**

#### **3.1 Where is the Dispute Settlement Mechanism regulated?**

The WTO Dispute Settlement Mechanism (DSM) is mainly regulated in one of the legal documents agreed at the end of the Uruguay Round, the so-called Dispute Settlement Understanding (DSU). This document can be accessed in the WTO website (click [here](#)). There are some special provisions in other WTO agreements, which may prevail to those contained in the DSU. For instance, Article 4 of the WTO Agreement on Subsidies and Countervailing Measures



contains some provisions that deviate from the general rules contained in the DSU. Appendix II to the DSU contains a list of all special rules. A translation of the WTO agreements into Ukrainian can be found [here](#), under “Тексти угод СОТ”.

### 3.2 **Functions, objectives and key features**

The main objective of the WTO DSM is to secure a positive solution to a dispute relating to the WTO agreements. The DSU expresses a preference for the Members at dispute to reach a mutually agreed solution. Panels and the Appellate Body should help Members in reaching an agreed solution, even when they have decided to go through the litigious stage.

The DSU sets forth that the WTO DSM must fulfil several functions. First, it must provide security and stability to the multilateral trading system. This is achieved by reinforcing the rule of law.

Second, the DSM must serve to preserve the rights and obligations of Members. The system must put at the hands of Members mechanisms to secure the withdrawal of measures found to be inconsistent with the WTO agreements. Through the use of those mechanisms, affected Members can ensure that their rights are enforced.

Third, the DSM should clarify the existing provisions of the WTO agreements. The terms of the Agreements are not always clear because they are the result of long and complicated diplomatic negotiations. Different Members may understand that a given term used in a WTO agreement means different things. Through the WTO DSM, panels and the Appellate Body interpret the existing rules in accordance with established principles of public international law (Vienna Convention on the Law of the Treaties).

Fourth and last, the DSM should contribute to the prompt settlement of disputes. Because violations normally have a negative economic impact on Members, the DSM should provide recommendations to the parties to a dispute as quickly as possible. In this regard, it should be noted that the WTO provides much faster determinations than many national judicial systems (for instance, most WTO panel reports are

published within 1 year from the establishment of the panel, while the EU General Court needs 2-3 years to issue a judgement).

**Box 1: Why does the DSM play a central role in the WTO system?**

It has been demonstrated that the sole presence of the DSM prevents the adoption of WTO-incompatible rules at national level. Where such rules are nonetheless adopted, the affected Members can use the “threat” of bringing a case to the WTO to force the infringing country to amend or withdraw the measure. As a last resort, WTO litigation can be pursued. A binding determination to the Members in the dispute will be adopted by the DSB in a far-shorter period of time than most national judicial systems. This procedure is strictly based on the rule of law. A retaliation system (enforcement mechanism) is in place to ensure that the losing Member will implement the ruling within an agreed period of time.

Where the complaining Member demonstrates that another Member is infringing a WTO covered agreement, that action is considered to constitute a case of nullification or impairment. In other words, when a Member demonstrates that another Member violated a specific provision, e.g. the obligation to immediately notify the initiation of a safeguard investigation, the complaining Member does **not** need to separately prove that the violation caused injury to it (or value the concrete injury suffered). Because of this, pleading and winning a WTO dispute is somewhat easier than in other jurisdictions where such evidence is required.

The DSU clearly prohibits unilateral actions to address violations of other WTO Members. WTO Members must use the channel set forth in the DSU, through the agreed procedures, and respect the rulings issued.

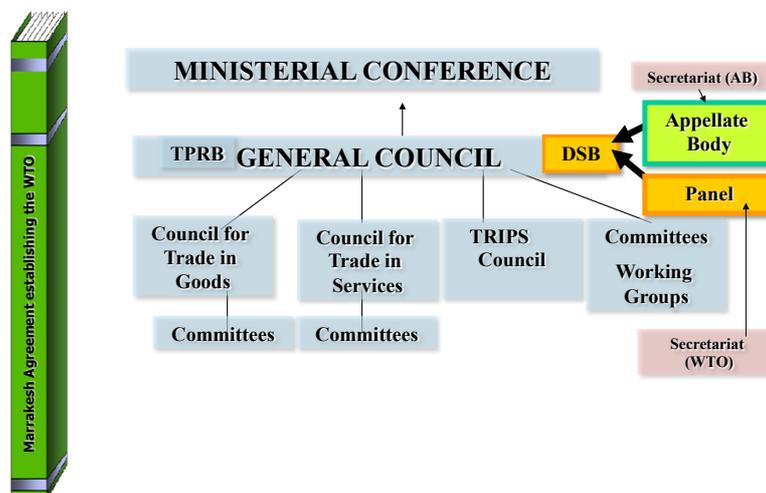
The DSU requires that disputes relating to the consistency of measures with WTO agreements be examined under the DSM (WTO’s exclusive jurisdiction).

DSM determinations have prospective effects only. Thus, the losing party is not required to compensate for the injury suffered until a measure is found to be inconsistent with a WTO agreement.

### 3.3 WTO bodies involved in the DSM

The following graph presents the main bodies involved in the DS procedure:

**Graph I:** Main bodies



Source: WTO

The Dispute Settlement Body (DSB) is at the apex. The DSB is a body composed by senior officials/representatives of all WTO Members. They meet regularly, at least once per month. The DSB takes some very important decisions such as the establishment of panels, and the adoption of panel or Appellate Body reports. It supervises the implementation of adopted reports. Finally, it appoints the Members of the Appellate Body and is in charge of the negotiations to clarify and improve the DSU.

The Appellate Body (AB) and the panels are responsible of one of the main functions under the DSM: the examination and adjudication of disputes. Panels examine the matters submitted by the parties to disputes and issue reports which assess the facts and relevant WTO provisions and formulate recommendations on the consistency of the examined measures. Panels are established *ad hoc* to examine a particular dispute. In turn, the AB reviews – at the request of a party to the dispute – certain aspects of a panel determination.

Panels and the AB are paid through the budget of the WTO. However, the parties to a dispute (the complaining and the Member complained against) bear their own costs, which include for instance hiring legal assistance and travelling to Geneva.

The WTO Secretariat, through the Director General and officials from various divisions, play an important role too. The Director General can help broker a solution through alternative dispute resolution mechanisms (good offices, conciliation, mediation or arbitration). The Director General can determine the composition of the panels (i.e. select the panellists) if one of the parties to the dispute requests so. The AB and panels are assisted by officials from the divisions overseeing particular WTO agreements at dispute. Thus, if the dispute concerns matters covered by the Agreement on Agriculture, one or more officials from the Agricultural and Commodities Division, in addition to one or more officials from the Legal Affairs Division, will assist the panel. The AB has a separate Secretariat to assist the Members of the AB.

Because some WTO agreements are highly technical, quite often panels require the assistance of technical experts in order to be able to assess and decide on matters before them. The DSU contemplates the possibility that panels request such assistance. This happens frequently in disputes concerning sanitary and phytosanitary matters.

### 3.4 **The parties in a dispute**

Each WTO dispute involves at least two parties:

- the Member that has allegedly breached its obligations under a WTO agreement (party complained against) and
- the Member that is challenging the alleged inconsistent measure (complaining party).

In some cases, more than one WTO Member complain against a measure:

### Box 2: One measure, many complainants

In March 2002, the United States imposed a safeguard measure on imports of a wide range of steel products. The safeguard measure, being imposed on an MFN basis (with the exclusion of certain developing countries), affected a large number of WTO Members. Nine of them – including the EU, Japan, Korea, China, and Brazil – launched WTO disputes against the United States.

A panel examined 8 of these complaints, finding against the United States. After losing at the Appellate Body stage too, the United States withdrew the safeguard measure in December 2003. Since 2003, as a result of the determination of panels and the Appellate Body regarding the interpretation of the WTO Safeguards Agreement, the United States has not imposed any safeguard measures.

Third parties are Members that have an interest in the dispute, whether because they are also negatively affected by the measure of the Member complained against, because albeit they are currently not affected by the challenged measure they could benefit from its withdrawal, or finally because they have a measure similar to the challenged one and would like to ensure that the DSM confirms that it is consistent with WTO obligations.

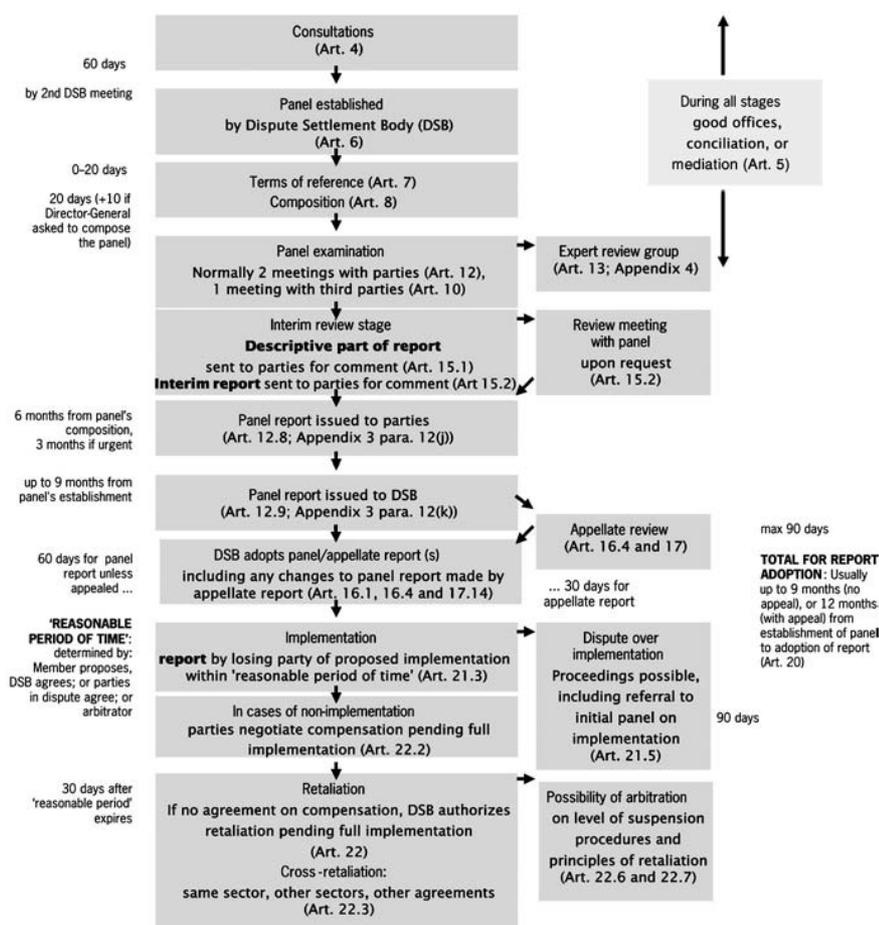
Private parties, including companies, consumers, and NGOs, do **not** have direct standing under the WTO DSM. Being the WTO Agreement (and all the agreements under it) an inter-governmental treaty, **only Governments** of countries and territories Members to the WTO can be complaining parties, parties complained against or third parties. Thus, unlike for instance in the International Center for the Settlement of Investment Disputes ([ICSID](#)), private parties **cannot** directly ask for the establishment of a WTO panel. However, as further developed below, private parties can lobby their Governments to pursue disputes, can participate in the preparation of written documentation to be submitted to panels/Appellate Body, or can even submit directly to the panel or the Appellate Body its views about the facts, interpretation of WTO law, etc. through *amicus curiae* briefs.

## 4 THE WTO DISPUTE SETTLEMENT MECHANISM – THE PROCEDURE IN-DEPTH

### 4.1 Diagram of the main stages in a WTO dispute settlement proceeding

The flow chart below shows the main stages in a WTO DS procedure:

**Graph 2:** Steps in a WTO dispute settlement procedure



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

These stages are developed in the following sections.

### 4.2 Consultations

Any request for consultations must be submitted in writing and include an identification of the measures at issue—i.e. the facts at issue—and of the legal basis for the complaint—i.e. the complaints or the WTO principles allegedly breached. The

DSU establishes time-periods for the holding of consultations. If the consultations have failed to settle the dispute within a period of 60 days—20 days for perishable goods—counted from the date of the request for consultations, the complaining Member may immediately request the establishment of a panel. Consultations are confidential.

Each consultation is unique as the parties are absolutely free with regards to the manner of holding them. The results and effectiveness of consultations largely depends on the efforts made by the parties to reach a solution to the matter at issue. Some consultation meetings may last only 5 minutes if the parties show no interest in examining the measures and complaints brought as regards the matter. Approximately 100 disputes have been settled at the consultation level, without a panel being established. That is, almost one in four disputes reaching the WTO can be solved in a short period of time, without incurring any large costs.

### Box 3: The experience of CIS countries

No one of the disputes between CIS countries (Ukraine, Moldova and Armenia) has proceeded beyond the consultations stage. This may be due to the fact that mutually agreed solutions to the “problems” were found. While the agreed solution should be notified to the WTO, in the disputes between CIS countries, no such notification has been sent to the WTO. Hence, the terms of the agreed solution are often not publicly known.

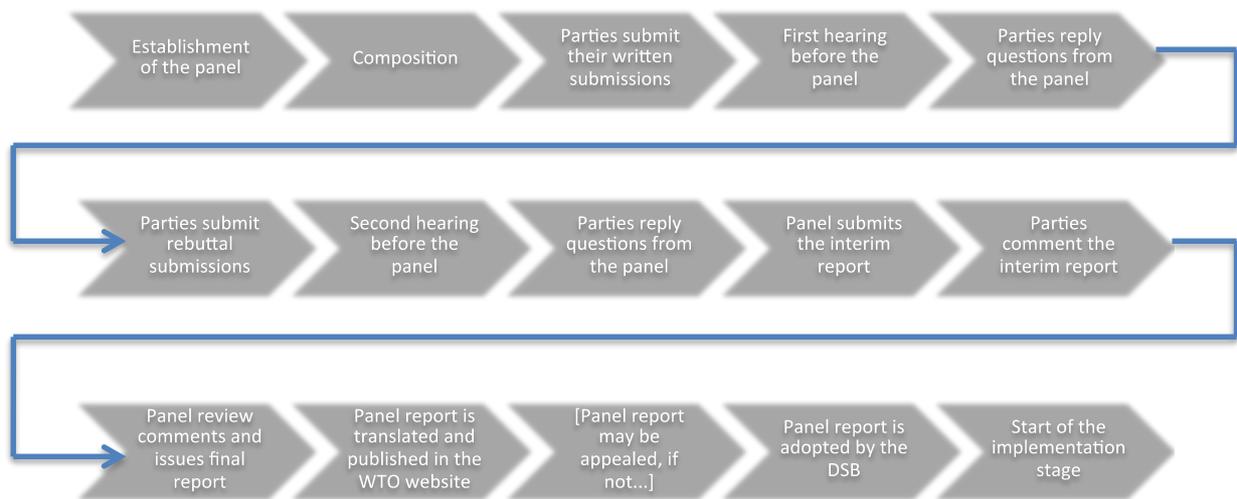
As a matter of example, the press-clipping “Украина раскурила трубку мира”, published in the [Kommersant](#) newspaper describes the agreement between the Ukrainian and Armenian Governments to solve the litigious matter. The following excerpt presents the view of the lawyer assisting the Ukrainian exporters (now Ukrainian Trade Representative):

*“Торговое разбирательство отняло бы значительное время. Для бизнеса быстрое решение проблемы более выгодно”, — говорит старший юрист юрфирмы “Василь Кисиль и партнеры” Наталья Микольская.”*

## 4.3 Panel

The following graph presents the main stages in the panel procedure:

### Graph 3: Panel procedure



Source: Consultant

### 4.3.1 Establishment of a panel

The request for the establishment of a panel initiates the panel stage. This document is prepared by the complaining Member. It is a very important document as it defines and limits the scope of the dispute and thereby the extent of the panel's jurisdiction. Only the measure or measures identified in the request become the object of the panel's review and the panel will review the dispute only in the light of the provisions cited in the complainant's request. A mistake in the request for establishment cannot be cured later on during the proceeding; a new dispute will have to be started.

Panels are established by the Dispute Settlement Body, at the request of the complaining Member. The Member complained against cannot effectively block the establishment of a panel.

### 4.3.2 Composition of a panel

Panels are normally composed of three panellists of professional standing and experience in the field in question, who shall serve in their individual capacities. An indicative list of individuals who may serve as panellists is kept by the WTO Secretariat. The Secretariat proposes nominations for the panel. If the parties do

not agree on the panellists within 20 days after the date of the request for the establishment of a panel, at the request of either party, the Director General of the WTO shall determine the composition of the panel. This way the Member complained against cannot block the composition of the panel.



### 4.3.3 Third parties

The remaining WTO Members may become third parties to a dispute. Third parties receive the first submissions of the parties and may participate in a special session of the first hearing.

Joining in the panel and appeal stages as a third party is highly valuable. A third party gets access to some of the written documentation submitted by the parties and can participate in a special hearing. If the Member wishes to engage further, it can prepare a written position and explain it orally in the hearing. It can also provide replies to questions from the panel/AB and parties. By participating in disputes as a third party, a Member gains practical, first-hand experience on the use of the DSM. Since Ukraine became a WTO Member in May 2008, it has registered third party rights in more than 10 disputes already (see box).

*Ukraine has reserved third party rights, among others, 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.*

### 4.3.4 The panel's duty

A panel should “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Furthermore, panels should motivate the parties to reach a mutually satisfactory solution.

The panel should issue its decision to the parties within 6 months, counted from the date that the composition and terms of reference of the panel have been agreed upon. In cases of urgency, the decision must be prepared in 3 months. If panels cannot respect these deadlines, they must inform the DSB of the reasons for any delays. In practice, several panels have required more than 9 months to complete their work due to the complexity of the disputes at issue.

Where the issues examined are very technical, such as sanitary and phytosanitary matters, the panel may seek the assistance of experts in the area. However, the panel will remain responsible for determining whether the examined measures are consistent or not with WTO agreements.

#### 4.3.5 The panel's work

Immediately after the panel is composed, the working procedures and the timetable will be finalised and issued. The working procedures address questions such as the treatment of confidential information, and the filing of factual evidence and preliminary objections. The timetable establishes deadlines for the main steps of the panel procedure, including the deadlines for the submission of written submissions, dates for hearings and date of submission of the final report. A standard (indicative) timetable is included in Appendix 3 of the DSU.

The panel work must be conducted in any of the 3 official languages of the WTO, i.e. English, French or Spanish. Thus, all *submissions* to the panel must be made in any of these three languages. This also applies to hearings. In fact, English is the most commonly used language in the WTO DSM.

### 4.3.6 What happens after the composition of the panel?

In accordance with the agreed timetable, the complaining party shall submit its first written submission. A few weeks later the responding party will file its own first written submission. The third parties will also file their views at that point in time.

In the World Trade Organization

European Communities – Measures Prohibiting the  
Importation and Marketing of Seal Products  
(DS400, DS401)

First Written Submission  
by the European Union



The written submissions are followed by a meeting (the first hearing) between the panel and the parties; such meeting includes a session devoted to third parties. The panel, and normally the parties, may submit written questions arising from the first meeting.

Geneva, 21 December 2012

A few weeks after the first hearing, both parties submit their second written submissions at the same time; this is followed by a second hearing between the parties and the panel with possible questions arising from the second meeting.

3-4 months after the second hearing, the panel will submit to the parties its interim report—*i.e.*, the descriptive part plus the findings and conclusions. The parties may request that the panel reviews the facts, the legal interpretations of the provisions examined and/or the findings and conclusions to which it has arrived after applying such provisions to facts. Depending on the nature of the issues to be reviewed, the panel may convene a third hearing with the parties. Upon conclusion of the review stage, the panel shall circulate the final report to the parties. Panel reports are published in the [WTO website](#) once they are translated in the three official languages.

#### 4.4 **Appellate Body**

The DSU established a standing Appellate Body (AB), with seven standing Members—of recognized authority, with demonstrated expertise in law, international trade and WTO—, three of whom shall serve on any one case. Each AB Member shall serve for a four-year term and may be re-elected once. Members of the AB are subject to strict conflict of interest and behaviour rules, and must be available to participate in any appeal as may arise.



Only the parties to the dispute may appeal the panel report, but third parties may participate as such in the appeal. The appeal shall normally last for 60 days, between the notice of appeal and the circulation of the AB report.

The jurisdiction of the AB is limited to issues of law covered in the panel report and the legal interpretations developed by the party. The AB may confirm, uphold, modify or reverse the legal findings and conclusions of the panel.

The Procedures of the AB govern the appellate proceeding. Such procedures are available clicking [here](#). Proceedings are confidential and the AB deliberates in closed sessions.

#### 4.5 **What can panels or the Appellate Body do if they find that a measure examined is inconsistent with the WTO agreements?**

Where the panel/AB concludes that a measure is inconsistent with a covered agreement, they shall recommend that the losing party “bring the measure into compliance” with the relevant WTO agreement. The losing Member will have the right to determine how to bring the challenged into compliance. Thus, it can choose for example to repeal the inconsistent measure. But it can also decide just to amend it, to remove the inconsistency.

In some specific cases, WTO agreements require the panels to make a specific recommendation. For instance, according to the Agreement on Subsidies and Countervailing Measures, if a panel/AB finds that a Member granted a prohibited subsidy, inconsistently with the rules in that Agreement, then the panel/AB must recommend the losing party to quickly withdraw the prohibited subsidy.

#### 4.6 **Adoption of panel/Appellate Body reports**

Panel/AB reports shall be adopted by the DSB. The losing party cannot block their adoption. Adoption triggers the start of the implementation stage, with the determination of the reasonable period of time to comply.

#### 4.7 **Reasonable period of time to comply**

The responding party to the dispute must inform the DSB of its intentions in respect of implementation within 30 days after adoption of panel/AB reports. If it is impracticable to comply immediately, the losing party shall have a reasonable period time to bring the measure into compliance. The period of time shall be that mutually agreed by the parties to the dispute or determined through binding arbitration. A guideline should be that the reasonable period of time should **not** exceed 15 months from the date of adoption of the report; however, that time may be shorter or longer, depending upon the particular circumstances. Thus, if the measure challenged is a law, the Parliament will normally have to be involved in its amendment. In this case, the implementation process will necessarily require more time than if the measure is a Governmental regulation or implementing decision.

#### 4.8 **Procedure to assess compliance**

What happens if the losing party decides to amend the measure examined by the panel (instead of withdrawing it) and, after doing so, the complaining Member considers that the amended measure continues to be inconsistent with the WTO agreements? Shall the complaining Member start a new dispute from the consultation stage?

The DSU contemplates that in the above situation, the dispute about whether the

amended measure is compliant with the WTO agreements must be decided through the intervention (wherever possible) of the original panel. This procedure is known as the “Article 21.5 proceeding”, because it is regulated by that provision of the DSU. This is a fast procedure, where the panel shall normally circulate its report within 90 days.

#### 4.9 **Non-implementation: compensation or suspension of concessions (retaliation)**

What happens if at the conclusion of the agreed reasonable period of time the losing party has not taken any action to bring the measure into compliance? Or, what happens if the losing party has taken an action which a panel/AB (in an Article 21.5 proceeding) determine to be inconsistent with WTO agreements?

The winning Member is entitled to resort to temporary measures – which can either be compensation or suspension of WTO obligations – until the losing Member brings the measure into compliance. Compensation, as the term indicates, consists in offering a benefit, for instance a tariff reduction, which is equivalent to the benefit which the losing Member has nullified or impaired by applying the illegal measure. Compensation can also take the form of a monetary payment, as the following case shows:

**Box 4: Compensation agreed in DS160 US — Section 110(5) Copyright Act**

The United States shall make a lump-sum payment in the amount of \$3.3 million (the "Payment") to a fund to be set up by performing rights societies in the European Communities for the provision of general assistance to their members and the promotion of authors' rights.

Source: Document WT/DS160/23

If an agreement on compensation is not reached, the winning Member can suspend obligations vis-à-vis the losing Member. This is not a measure unilaterally adopted by the winning Member; rather, it must be approved by the DSB. The DSB will authorize the suspension if the request is consistent with the decision of the arbitrator.

The methods to determine the limit of retaliation, and hence the amounts established, vary from case to case. The highest amount so far determined is the retaliation in the

*Foreign Sales Corporation* dispute, exceeding USD4 billion per year. This amount was in place until the US withdrew certain prohibited subsidies, in 2006.

If the losing Member objects to the level of suspension requested, an arbitrator will decide the appropriate amount. The arbitrator must determine whether the level of nullification or impairment is equivalent to the requested level of suspension. Normally the level of suspension will be equal to the level of damage caused by the violation.

So far, in 10 cases the DSB has authorised the suspension of concessions. Several of them remain unresolved, such as the *EC – Hormones*, *US – Byrd Amendment*, or the *US – Section 110(5) Copyright Act*. Others, such as the *EC – Bananas*, *US – Upland Cotton* and *US – Foreign Sales Corporations*, after years of suspension of concessions in place, were resolved.

#### 4.10 **Conciliation, mediation, good offices and arbitration**

The parties to the dispute may resort to conciliation, mediation or good offices to resolve the controversy at any time. The parties may also mutually agree to resort to arbitration.

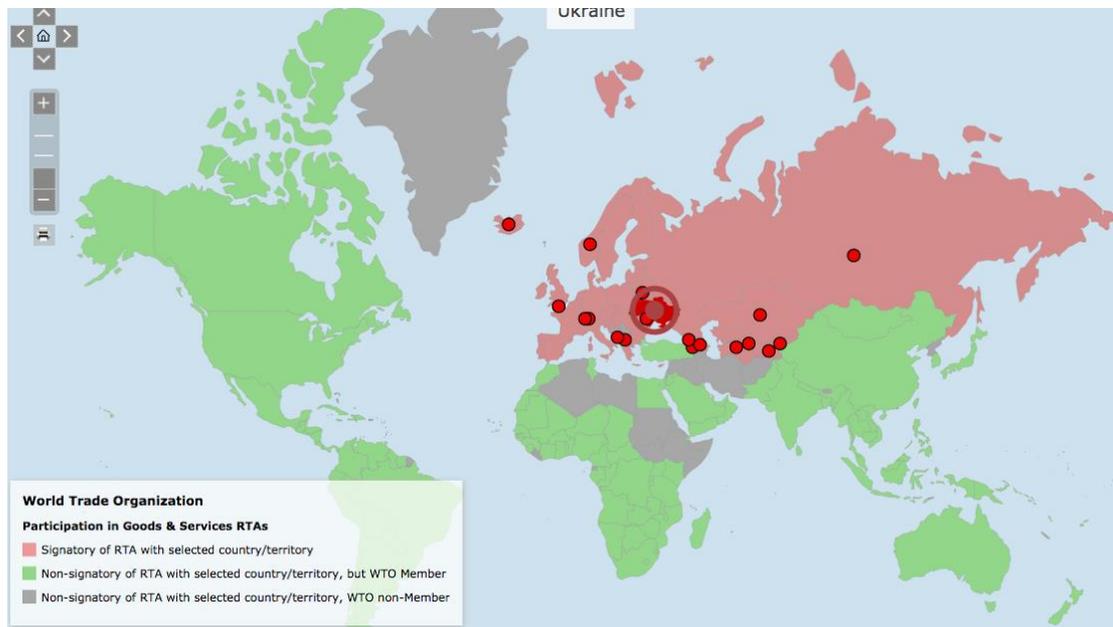
Conciliation, mediation and good offices have rarely been used. Mediation was the mechanism involved in the settlement of a dispute relating to certain measures imposed by the European Union on tuna imports from Thailand and The Philippines. In turn, the level of suspension of concession in the dispute *US – Section 110(5) Copyright Act* was determined using arbitration.

## **5 UKRAINE AND INTERNATIONAL TRADE DISPUTE SETTLEMENT MECHANISMS**

### **5.1 Dispute settlement in international trade agreements signed by Ukraine**

Since 2008, Ukraine is WTO Member. In addition, Ukraine has various regional or bilateral trade agreements ratified, which are marked in red in the following graph:

**Graph 4:** Countries with whom Ukraine has signed international trade agreements



Source: WTO (as of end of April 2015)

Ukraine has been involved in various WTO disputes. Up to end of October 2015, Ukraine had been complainant in 4 occasions and defendant in 3 occasions. Finally, in more than 10 occasions it has reserved third party rights.

**Graph 5: WTO disputes involving Ukraine**



Source: WTO (as of end of June 2015)

The panel report in *Ukraine – Passenger Cars* was published on 26 June 2015. The panel concluded that the determination in the safeguard investigation concerning passenger cars was inconsistent with several provisions of the WTO Agreement on Safeguards and the GATT 1994. The box on the right presents some information about this dispute. For a more detailed summary of the findings, or to consult the panel report in full, click [here](#). Since Ukraine did not appeal the findings, the report was adopted by the DSB in August. By 30 September, the safeguard measure was terminated, putting an end to the dispute.

*Ukraine initiated a safeguard investigation concerning imports of passenger cars in July 2011. The notice imposing the measures was published in March 2013; measures were to apply for a period of 3 years. Japan requested consultations over the measures in October 2013. Since no agreed solution was reached, it requested the establishment of a panel. This was established in March 2014. The panellists, experienced trade experts from the US, Brazil and Taiwan, were appointed in June. In March 2015, after 9 months, they issued the final report to the parties.*

The second dispute in which Ukraine has been actively engaged during the past months is *Australia – Tobacco Plain Packaging*. In May 2015 Ukraine asked the panel to suspend its work in order to try to find a mutually agreed solution with Australia. Disputes are frequently coming to an end as a result of these suspensions.



In October 2015, Ukraine started a dispute with the Russian Federation as a response to a series of measures impeding the export, and operation, in Russia of Ukrainian-manufactured

railway rolling stock (wagons), railroad switches, other railway equipment and parts thereof. Exports of Ukrainian railway equipment to Russia decreased from more than USD1.7bln in 2013 to merely USD51mln during the first semester of 2015, causing large economic damage to Ukraine.

Ukraine is also actively involved in responding to the request for consultations of Russia against the result of the sunset review concerning ammonium nitrate. This anti-dumping measure is being vigorously defended by the Ministry.



In parallel, as a third party in a number of other disputes, Ukraine is presenting its views in regard issues which may directly or indirectly affect its interest. This includes for instance the use of trade remedies by the US, various measures imposed by Russia, etc.

The following table summarises information regarding recent cases involving Ukraine as complainant or defendant:

**Table I:** Ukraine in the WTO Dispute Settlement

Dispute	Status and main issues	Role played by Ukraine
Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging	<ul style="list-style-type: none"> <li>• <b>Suspended</b> (vis-à-vis Ukraine only)</li> <li>• <b>Issue:</b> Certain requirements regarding the appearance and form of the retail packaging of tobacco products, as well as the tobacco products themselves</li> <li>• <b>Products</b> concerned by the measures: Tobacco products (cigarettes, cigars etc.)</li> </ul>	<ul style="list-style-type: none"> <li>• Ukraine is one of the co-complainants</li> <li>• As a party, Ukraine has the opportunity to submit its positions through various written submissions and hearings. Private parties could submit amicus curiae briefs</li> </ul>

Requirements Applicable to Tobacco Products and Packaging (DS434)	<ul style="list-style-type: none"> <li>• <b>Legal instruments</b> involved: Tobacco Plain Packaging Act and its Regulations; Trade Mark Amendment</li> </ul>	<ul style="list-style-type: none"> <li>• As a third party in DS435, 441, 458 and 467, Ukraine supports the views of the other complainants, and its views, on the inconsistency of the Australian measures</li> <li>• Who may have an interest in this dispute? The Government of Ukraine and the Ukrainian tobacco producers affected by the measure</li> </ul>
Ukraine — Definitive Safeguard Measures on Certain Passenger Cars (DS468)	<ul style="list-style-type: none"> <li>• <b>Panel stage completed</b> (panel report was published in June 2015)</li> <li>• <b>Issue:</b> Japan argued that Ukraine violated various provisions of the WTO Safeguards Agreement in its safeguard investigation</li> <li>• <b>Products</b> concerned by the measure: Certain passenger vehicles</li> <li>• <b>Legal instrument</b> involved: Inter-Departmental Commission for International Trade decision No. SP-275/2012/4423-08</li> </ul>	<ul style="list-style-type: none"> <li>• As a party, Ukraine has the opportunity to submit its positions through various written submissions and hearings. Private parties could have submitted amicus curiae briefs</li> <li>• Who may have an interest in this dispute? The Government of Ukraine, the Ukrainian producers of the goods subject to the safeguard measures as well as producers of inputs used in the production of such goods, and finally, consumers</li> </ul>
Ukraine – Anti-Dumping Duties on Ammonium Nitrate (DS493)	<ul style="list-style-type: none"> <li>• <b>Consultations ongoing</b></li> <li>• <b>Issue:</b> The Russian Federation argued that the extension of the anti-dumping duties was not consistent with several provisions of the Anti-Dumping Agreement</li> <li>• <b>Products</b> concerned by the measures: Certain fertilizers</li> <li>• <b>Legal instrument</b> involved: Inter-Departmental Commission for International Trade decision No. AD-294/2013/4423-06 (initiating the sunset review) and AD-315/214/4421-06 (extending the measures)</li> </ul>	<ul style="list-style-type: none"> <li>• Ukraine is currently engaged in the consultations with Russia</li> <li>• Who may have an interest in this dispute? The Government of Ukraine, the Ukrainian producers of the goods subject to the anti-dumping measures as well as producers of inputs used in the production of such goods, and finally, farmers</li> </ul>
Russian Federation – Measures affecting imports of railway equipment (DS499)	<ul style="list-style-type: none"> <li>• <b>Consultations ongoing</b></li> <li>• <b>Issue:</b> Ukraine posited that Customs Union and Russian normative acts and individual decisions are inconsistent with the TBT Agreement and GATT 1994</li> <li>• <b>Products</b> concerned by the measures: Railway rolling stock (wagons), railroad switches, other railway equipment and parts thereof</li> <li>• <b>Legal instrument:</b> Three Customs Union Technical Regulations as well as internal (Russian) legislation and individual decisions applicable to Ukrainian exporters</li> </ul>	<ul style="list-style-type: none"> <li>• Ukraine is currently engaged in the consultations with Russia</li> <li>• Who may have an interest in this dispute? The Government of Ukraine, the Ukrainian producers of the goods subject to the inconsistent measures as well as producers of inputs used in the production of such goods</li> </ul>

Source: WTO website

In sum, during the recent past Ukraine has been an active user of the WTO dispute settlement mechanism to defend its interests. Where its trade interests have been affected, Ukraine does not hesitate to attack measures perceived to be inconsistent with WTO obligations. Ukraine will continue to assert its rights whenever they are not respected by its main trading partners. By contrast, as the dispute on passenger cars shows, trade measures adopted by Ukraine must also conform to Ukraine's international obligations because any Member can attack them in the WTO.

Ukraine is one of the States party to the *Agreement on the Free Trade Zone* (also ratified by Belarus, Russia, Kazakhstan, Kyrgyzstan, Armenia, Tajikistan and Moldova). According to Article 19 of this Agreement, if one of the Parties considers that another Party does not comply with its obligations and that such behaviour damages, or threatens to damage, the economic interests of the former Party, then both Parties must enter into consultations in order to find a mutually agreed solution.

Where Parties cannot resolve the difference, the complaining Party may bring a case before the Economic Court of the CIS or request the establishment of a panel in accordance with the detailed rules set forth in Appendices 4 and 5 to the Agreement. These rules generally resemble to those contained in the WTO Dispute Settlement Understanding. There is so far no practical experience in the use of this instrument.

Generally, the bilateral trade agreements ratified by Ukraine also contain dispute settlement provisions. These agreements often provide for diplomatic means to resolve disputes. An example is Article 14 of the Free Trade Agreement between Ukraine and the Russian Federation. By contrast, recently negotiated Free Trade Agreements (FTA), see e.g. the *Ukraine-Montenegro FTA*, contemplate also the establishment of arbitration panels in case that Parties cannot resolve disputes through consultations or other quasi-diplomatic means. As is the case for other trade agreements, access to the dispute settlement mechanisms in FTAs is also limited to the Governments of the Parties to the agreement at stake. As is the case for *Agreement on the Free Trade Zone* there is so far no practical experience in the use of this instrument.

Finally, Ukraine may use dispute settlement mechanisms in international agreements in which it is *not* party. An example is presented below.

**Box 5: Challenge of trade-related measures in the European Union**

The Government of Ukraine or Ukrainian companies can, in certain cases, bring trade-related disputes to the EU Court of Justice. Based on this right, the Ukrainian company Interpipe challenged certain aspects of the EU Regulation imposing anti-dumping measures on imports of seamless tubes. The General Court issued a judgement in 2009, later confirmed by the Court of Justice, which obliged the Commission to recalculate the margin of dumping for the exporter at stake. As a result, the anti-dumping measure decreased from 25.1 to 17.7%.

Since 2012, the volume of exports from Ukraine to the EU under Combined Nomenclature code 7304 – which includes seamless pipes and tubes covered by the anti-dumping measures – has increased from 56,467 (2012) to 86,326MT (2014). In comparison, a large exporter and competitor – Russia – barely exported 15,000MT in 2014.

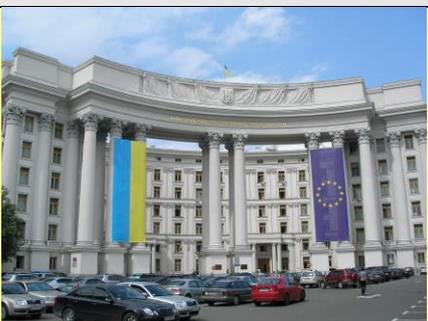
Source: Prepared by the consultant

Outside the trade-related area, Ukraine is part of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* that set up the International Centre on the Settlement of Investment Disputes. A number of cases have been brought by international investors against Ukraine.

## 5.2 Stakeholders involved in international trade disputes

The Ministry of Economic Development and Trade (MEDT) is the main institution in charge of defending the interests of Ukraine and its exporters in the context of international trade dispute mechanisms. In so doing, the MEDT may seek assistance from other governmental institutions. Finally, the private sector should play a key role when challenging foreign-trade practices.

**Table 2:** Summary of the main competences of each stakeholder in WTO disputes

	<p><b>Ministry of Economic Development and Trade – Ukraine Trade Representative and Department of Cooperation with the WTO and on Trade Protection</b></p> <ul style="list-style-type: none"> <li>• Preparation of a case, including defining the strategy</li> <li>• Drafting of all documents to be submitted (requests for consultations and establishment of panels, first and second written submissions, replies to questions etc.) and participation in the hearings before panels and the Appellate Body</li> <li>• Coordination and cooperation with other Departments of the MEDT and line ministries</li> <li>• Hiring of external assistance</li> <li>• Participation in meetings of the Dispute Settlement Body</li> </ul>
<p><b>Ministry of Foreign Affairs</b></p> <ul style="list-style-type: none"> <li>• General representation of Ukraine’s interests in this area through the Mission to the WTO</li> <li>• Cooperation and coordination of positions with other WTO Members</li> <li>• Receipt of notifications / Submission of documentation to the panel / Appellate Body</li> <li>• Participation in the meetings of the Dispute Settlement Body</li> </ul>	
	<p><b>Ministry of Agrarian Policy and Food</b></p> <ul style="list-style-type: none"> <li>• Assistance to the MEDT on technical aspects relating to SPS-related cases</li> </ul>
<p><b>State Customs Service of Ukraine</b></p> <ul style="list-style-type: none"> <li>• Assistance to the MEDT on technical aspects relating to origin, valuation and classification-related cases</li> </ul>	
	<p><b>Private sector</b></p> <ul style="list-style-type: none"> <li>• Inform the MEDT of any possibly inconsistent practices of other WTO Members</li> <li>• Cooperate throughout a dispute with the MEDT by providing all information at the private sector’s disposal that may be relevant for a case</li> <li>• May hire its own legal advisor to assist the Government in preparing and pleading a case</li> </ul>

Source: Prepared by the consultant

In case of disputes initiated by Ukrainian exporters before foreign courts, the Government of Ukraine may support exporters by, for instance, exchanging views on possible lines of argumentation to attack a particular decision. The Government may also intervene (i.e. participate) to support aspects litigated by a Ukrainian exporter, where allowed under the domestic law of the country at stake and the case merits it. Since the Court systems are typically independent, Government-to-Government negotiations will normally not assist in the context of court challenges pursued by Ukrainian exporters.

## 6 THE PRIVATE SECTOR AND THE REVIEW OF TRADE-RELATED MEASURES

### 6.1 The preconditions

A realistic **cost-benefit analysis** must be made by the private sector before deciding whether to pursue a case, whether before a local court or an international dispute settlement mechanism. The costs, especially of international disputes, involved may be high (see below) and the Government may require the private sector to bear a portion thereof. As the example below clearly shows, there are many instances where WTO disputes make sense from an economic point of view.

#### Box 6: Cost/benefit of the zeroing disputes

In 2000, the *EC – Bed linen* panel found that the practice of zeroing in dumping calculations was illegal. With zeroing, the margins of dumping and duties imposed on the Indian bed linen producers were inflated. As a result, additional thousands of euros had to be paid by European importers. With the recalculation of the dumping margin without zeroing, duties decreased substantially and for some exporters, no anti-dumping duties were applicable anymore. This dispute directly helped hundreds of Indian bed linen exporters.

The economic impact of the *EC – Bed linen* finding is, however, much larger. The determination that zeroing is not permitted in various contexts was repeated in many WTO proceedings since 2000, leading to lower anti-dumping duties in the EU, US etc. and hence to savings of millions of USD to importers.

Source: Prepared by the consultant

Where the private sector decides not to pursue a case because the costs outweigh the current trade affected, it should still approach the MEDT and report trade barriers

faced. If the case is deemed important for systemic reasons or the trade potential following the removal of an illegal barrier is high, the MEDT may pursue the case with its own resources.

A not-to-be-missed consideration is that under certain systems, such as the WTO DSM, a Member that lost a dispute normally retains the **right to decide how to bring the challenged measure into conformity** with the provisions of international agreements. Thus, the losing Member may withdraw the illegal measure. Or, it may decide just to amend it to remove the inconsistency found. Depending on the action of the losing Member, market access may – or may not – be restored.

#### **Box 7: Canada's automotive measures**

Canada had a number of measures applicable to the automotive industry which were attacked by Japan and the European Union. Several of these measures were determined to be inconsistent with Canada's WTO obligations, and Canada removed them. However, following the adoption of the panel and Appellate Body reports, Canada decided to raise the applied import duty on automobiles up to the rate it had bound during the Uruguay Round negotiations. This increase was permitted by the WTO and hence could not be attacked by Japan and the EU. As a result of the Canadian measure, access to that market continued to be difficult for Japanese and EU exporters.

Of course, there are many cases where a successful WTO challenge has as a consequence an improvement of market access. The *EC – Bed linen* case cited above, or the cases regarding the EC customs classification of certain Information Technology equipment and chicken, are some examples. It is therefore advisable to analyse together with the MEDT – before starting a dispute – the implementation options available to the other country.

Because international trade disputes involve Governments, they may have repercussions on Ukraine's relationships with those countries. For this reason, before bringing any such dispute not only the information and interests related to a particular group of exporters may be considered. Rather, the Government must take into account the interests of other groups and of the country as a whole. Importantly, the Government of Ukraine **cannot proceed with international disputes unless the domestic industry pursuing a case is fully committed to support it**, throughout the stages of the dispute settlement mechanism at stake.

The private sector – in particular their business associations and large exporters – is advised to make use of all trainings and seminars available in order to **improve its knowledge of dispute settlement mechanisms**. Besides this, it is advisable to acquire and study manuals covering this topic as well as the materials freely available in the WTO website, such as the [Analytical Index](#). Reading panel and Appellate Body reports is another effective manner to quickly increase knowledge.

## 6.2 The private sector and domestic judicial review

The existence of well-functioning judicial review mechanisms to review trade-related measures adopted by governments is an essential tool to protect the interests of the private sector. The existence of such a domestic review mechanism is required by the WTO. For instance, Article X of the GATT 1994 provides that:

### Box 8: Article X.3 (b) of the GATT 1994

(b) Each contracting party shall maintain, or institute as soon as practicable, **judicial, arbitral or administrative tribunals or procedures** for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be **independent** of the agencies entrusted with administrative enforcement and their decisions shall be **implemented by, and shall govern the practice of, such agencies** unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

This requirement is contained in several other WTO agreements, such as Articles 13 of the Anti-Dumping Agreement, 11 of the Customs Valuation Agreement, and 21 of the Agreement on Subsidies and Countervailing Measures.

A common feature of domestic judicial review mechanisms is that access to them must be granted to the private sector, whether domestic producers, importers etc. This is a major difference with the WTO DSM, direct access to which is limited to governments. Through domestic review systems, the private sector can ensure that its own Governments are acting consistently with their WTO commitments.

### 6.3 The private sector and supranational judicial review of trade-related measures

What happens in case a Ukrainian company faces a problem outside the national borders? As stated above, in some cases an exporter can attack a decision by itself, while in other cases it can challenge a measure only with the intervention of the Government. For instance, Ukrainian exporters cannot directly challenge measures of foreign countries in the WTO DSM. Therefore, to protect their interests before the WTO DSM, exporters would need to try to convince the Ukrainian Government to launch a case.

The private sector in countries as different as Brazil, Costa Rica, Mexico, Dominican Republic, the US, EU, India or Thailand have been actively engaged in particular disputes, as the following box shows.

#### **Box 9: Cooperation public-private sector in WTO disputes**

In 1998 the Indian association representing the interests of the bed linen producers, TEXPROCIL, started lobbying the Government of India to start a case against the EU. TEXPROCIL hired the firm that prepared the submissions for the Government of India, and that pleaded the case. TEXPROCIL bore the costs of bringing the case.

Similar cases include the challenges brought by Brazil, against an EC anti-dumping measure on pipe fittings, and by Mexico, against a dumping measure imposed by the US on cement. In both cases, the Brazilian and the Mexican exporter bore the costs of hiring a firm that prepared the case for the Brazilian and Mexican Governments.

In some cases, domestic industries closely cooperated with their Governments, even paid for legal advisors, when decisions taken by their Governments have been challenged in the WTO. For instance, in the Dominican Republic the main tobacco producer, and a producer of sacks and bags, bore the costs of the representation in two separate disputes.

Source: Prepared by the consultant

The cost of using the WTO DSM is an important factor to be taken into account. Generally, international dispute settlement is seen as an expensive exercise. However, cost varies greatly depending on the representative chosen. The firms leaders in the field cost anything between USD500,00-1,000,000 (for the panel proceeding only). Other firms, with also considerable experience and sound track records, cost around USD300,000-500,000. The Advisory Center on WTO Law, an international organisation whose main area of work is to represent developing countries in WTO

disputes, charges between USD150,000-250,000 for similar assistance. As indicated above, the decision of pursuing a dispute is a cost/benefit determination. The investment is quite high and the opening of the foreign market may take several years, but the benefits – if the dispute is won – should also last over time.

## 7 IMPORTANT CONTACT DETAILS

### 7.1 Governmental authorities

The Ministry of Economic Development and Trade (MEDT), being in charge of Ukraine's trade policy area, is responsible for negotiating and using the WTO dispute settlement mechanism. Within the Ministry, the Minister is ultimately responsible for taking decisions on bringing disputes to the WTO. In cases where deemed relevant, decisions may be discussed in the Council of Ministers. At technical level, the Department for Trade Protection is responsible for monitoring the implementation of WTO provisions by other members of this international organization and for protecting the rights and interests of Ukraine in the trade and economic sphere using WTO mechanisms (including dispute settlement).

Specifically, in the dispute settlement area the MEDT coordinates all involved stakeholders, is responsible for finalising and submitting all written documentation as well as pleading the cases before WTO panels and the Appellate Body. MEDT also conducts trainings to the private sector to improve the understanding of dispute settlement mechanisms.

#### Box 10: Contact details in the MEDT

Mrs. Natalia Mykolska  
Vice-Minister, Ukraine Trade Representative  
Telephone: +38 044 253 35 83  
Fax: +38 044 226 31 81  
Email: [pr3@me.gov.ua](mailto:pr3@me.gov.ua)

Mrs. Olesya Zaluska  
Director, Department for Trade Protection  
Telephone: +38 044 596 68 01  
Fax: +38 044  
Email: [ozaluska@me.gov.ua](mailto:ozaluska@me.gov.ua)

Depending on the nature of the dispute, officials from responsible line Ministries (Agrarian Policy and Food, Finance/State Customs Service, Ecology and Natural Resources etc.) may have to support directly the team from the MEDT.

## 7.2 Business associations and leading law firms in this area

Business associations are called to play a central role in ensuring the enforcement of the country's rights under international trade dispute settlement mechanisms.

### Box 11: Contact details of the ...

Mr. ...

Telephone: +38 044

Fax: +38 044

Email:

Renowned Ukrainian firms in the area of international trade, or Ukrainian lawyers in foreign firms, can be found in the following box.

### Box 12: Contact details of law firms

Sayenko Kharenko, Ms. Tatyana Slipachuk (Partner)

Telephone: +38 044 499 60 00

Fax: +38 044 499 62 50

Email: [TSlipachuk@sk.ua](mailto:TSlipachuk@sk.ua)

Van Bael & Bellis, Mr. Yuriy Rudyuk (Partner)

Telephone: +32 2 647 73 50

Fax: +32 2 640 64 99

Email: [y Rudyuk@vbb.com](mailto:y Rudyuk@vbb.com)

## 8 FURTHER READING

### WTO materials (in WTO website)

- 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”

### Other sources of information about WTO DSM

- [A handbook on the WTO Dispute Settlement Mechanism](#)
- Australia ([dispute settlement](#) link)
- European Union ([dispute settlement](#) link)
- [The Calculation and Design of Trade Sanctions in WTO Dispute Settlement](#)
- UNCTAD dispute settlement project – [panels](#) and the [appellate body](#)
- United States – US Trade Representative ([dispute settlement](#) link)

### Compilations and summaries of WTO rulings

- [worldtradelaw](#)
- [tradelawguide](#)