

Lecture 33: Panel Proceedings

Dear students, in this class we are going to discuss about the Panel Process. The entire Panel Process which is provided in the WTO dispute settlement understanding. So, panel is the preliminary body adjudicatory body in all the cases to be dealt by the panels. And they come out with the reports and which may be appealed or which may not be appealed. If it is not appealed then it will be adopted by the dispute settlement body and it will become a final ruling. So, if it is if any one of the parties preferred an appeal it will go to the appellate body. So, here we can see the panel process is a very simple process which is different from the GATT process. So, we said that the GATT the even though they started the adjudicatory system through third parties that is the panels and there was no procedural aspect which was prescribed specific aspects was prescribed or specific qualification is prescribed. Usually the government officers they sit as panel members and they come out with reports.

CONCEPTS COVERED

- **Constitution of Panel**
- **Panel Process**



And in the WTO system it is not a permanent panel is not a permanent body, but it comes out with independent panel members which are not related to the parties.

Panels

- **The various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consult each other in order to settle “out of court”.**
- **At all stages, the WTO director-general is available to offer his good offices, to mediate or to help achieve a conciliation.**
- **Panels are quasi-judicial bodies, in a way, tribunals, in charge of adjudicating disputes between Members in the first instance.**
- **They are normally composed of three, and exceptionally five, experts selected on an ad hoc basis**

So, these panel members this is the panel system is the initial stage of dispute settlement the first stage of dispute settlement. And the DSU encourages members to settle their disputes through consultations before the panel is formed. And the WTO director general also may offer his good offices or mediate to achieve a solution through conciliations. And panels are considered to be a quasi-judicial bodies or tribunals and the members adjudicate the disputes. And normally they composed of 3 members and exceptionally 5 members purely appointed on ad hoc basis for individual disputes. So, it is not a permanent body and they are absolutely appointed as ad hoc bodies for a particular case.

Panel

- **This means that there is no permanent panel at the (WTO); rather, a different panel is composed for each dispute.**
- **Anyone who is well-qualified and independent (Articles 8.1 and 8.2 of the DSU) can serve as panelist.**
- **Article 8.1 of the DSU mentions as examples persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement,**
- **or who have worked in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.**

And no permanent panel members and different panels for different cases are formed. So, the qualification says they are well qualified and independent people can serve as panelist. And the persons the panelists those who are well versed in international trade law or former diplomats also they can become the panel members or those who have worked in the secretariat. So, those who have taught or published on international trade policy, trade law, senior trade policy, the officials of the governments they can also become the panel members.

Panels

- **The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn ([Article 8.4](#) of the DSU).**
- **[WTO Members](#) regularly propose names for inclusion in that list, and, in practice, the [DSB](#) always approves their inclusion without debate.**
- **It is not necessary to be on the list in order to be proposed as a potential panel member in a specific dispute.**



So, always the WTO secretariat maintains a list of names nominated by the governments, non-governmental persons. So, the panelists may be drawn. So, the panel WTO members can propose the names for inclusion in the list and approves their inclusion without any debate. So, that means, the panel members so, the every country can propose the panel members as a potential panel member in specific disputes.

Panel

- **The request for the establishment of a panel shall be made in writing.**
- **It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly (A.6).**
- **Terms of reference of Panel (A.7).**
- **Panel members:**
 - **Well-qualified governmental and/or non-governmental individuals,**
 - **Former Secretariat officials and**
 - **Trade academics or lawyers.**
 - **Purely on Ad-hoc basis**

So, after the consultations failed if any member wants to constitute a panel. So, the request a specific request is to be sent in writing. So, it shall it should indicate the details of the consultations when it is made and identifying specific measures at issue or which are the agreements and the provisions violated by the other member and also the summary of legal basis of the complaint. That means, not mere allegations or conjuncture clear cut identified legal basis of the dispute to be presented along with the request. And then the panel members is as we already said that they may be well qualified governmental, non-governmental people, secretariat officials or trade academicians, lawyers and they will be appointed by the WTO, the DSB for adjudicating a particular case.

Panel Process

- **It is specifically provided that panelists shall not be nationals of parties or third parties .**
- **establishment, any party to the dispute may request the WTO Director-General to appoint the panel.**
- **Over time, it has become more common for the Director-General to appoint panels.**
- **oral and written submissions.**
- **Adduce of evidence.**
- **Use of experts and scientists.**
- **Interim report – final report.**
- **Adoption of the Report by DSB**

And the most importantly, the most important criteria is that the panelist shall not be the nationals of the parties. It means that they are going to be 100 percent independent. They are not going to be belongs to a particular state of parties those who are in dispute and the third parties can join those who are interested in the particular dispute can join as third parties. So, the parties should ask the WTO director general to appoint a particular panel and then it is like it works like a completely a judicial body. So, there will be oral statements, written submissions and adduce of evidence and even the panel can use the support of experts, experts scientist and there is a there can be an interim report and there can be a final report then finally, the adoption of the report by the dispute settlement body. In short the panel process and finally, the reports will be adopted.



Panel Proceeding

- If the consultations do not resolve the matter, and the complaining Member elects to proceed with dispute settlement proceedings, it may request the establishment of a panel to hear the dispute.
- A request for the establishment of a panel must identify the specific measures about which the Member is complaining and provide a summary of the legal basis of the complaint. (DSU article 6)



So, all these are going to happen only if the consultations the there is no agreement was you know concluded after the consultations.

Constitution

- The panel is made up of three members who are nominated by the WTO Secretariat and (in theory) appointed by the disputing parties.
- The Director-General of WTO may appoint panelists if the disputing parties cannot agree on the panelists.
- The role of the panel is to examine the relevant measures in light of the relevant provisions of the WTO agreements and to make recommendations to the DSB as to whether the measures at issue comply with relevant WTO rules (DSU articles 7, 8 and 11)



So, the violations should be very clearly mentioned.

Panel Powers

The basic rules governing panel proceedings are set out in Article 12 of the DSU. Article 12.1 of the DSU directs a panel to follow the Working Procedures contained in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. In *India – Patents*, however, the Appellate Body cautioned panels as follows:

*... Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: "Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute". Yet that is all that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU.*⁷¹



And also you can see that the terms of reference of the panel should be clearly mentioned. Now, we see what are the powers of the panel members? what actually they are supposed to do? We said that adjudication of the particular dispute which is given to them, but what are the principles to be followed by the panel members? What are the powers of the panel members? So, the basic rules of panel proceedings are found in the article 12 of the DSU and the article 12 says that the panel should follow the working procedures prepared by the WTO contained in the appendix 3 to the dispute settlement understanding. And so, they the panels are authorized to adjudicate the dispute. See one of the first cases India patent case the appellate body has mentioned, appellate body has clearly elucidated what is the role of this panel and what is the power of the panels and what are the duties of the panel. I quote although the panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modify the substantive provisions of the DSU. To be sure article 12.1 of the DSU says panel shall follow the working procedures in appendix 3 unless the panel decides otherwise after consulting the parties to the dispute. And that is all that it says nothing in the DSU gives panel the authority either to disregard or to modify other explicit provisions of the DSU. So, the appellate body made it clear that the panels cannot exceed the working procedures. They have to follow the working procedures mentioned under article 12.1. So, the panel should act according to the working procedures.

Third Parties

- **Other WTO Members (apart from the complaining Member/s and the responding Member) with a substantial interest in a matter may apply to become a third party to the dispute during the panel process.**
- **Third parties receive the submissions of the disputing parties and have the opportunity to make written and oral submissions to the panel (DSU article 10).**



So, the procedures unlike the GATT disputes settlement system, the procedures are clearly mentioned and third parties. Third parties are a group of countries those who join a particular dispute other than the disputants. Any country those who are interested in a particular dispute can join as third parties and submissions of third parties also will be accepted by the panel and opportunity of written and oral submissions are also to be made. And what is the impact of these written and oral submissions are not clear, but definitely the panel is going to consider the written and oral submissions of the panel like the disputing parties because they want to protect their own interest that is why third parties are allowed. So, they should be heard they should be heard before the panel come out with the reports.

Panel

- After a panel report has been issued and has been placed on the DSB's agenda for consideration, the DSB will adopt it unless all of the Members agree by consensus not to adopt the report (which has never happened).
- The panel report 'takes effect' once it has been adopted by the DSB (DSU article 16).



And the panel reports are adopted by consensus we said that by negative consensus and it is once it is adopted by the DSB it takes effect that is binding on the parties to the dispute.

Panel

- The duty of the Panel is to assist the DSB in its functions.
- The Panel should make an **objective assessment of the facts of case and applicability and conformity with the agreements.** (A.11).
- Within 30 days members to inform the DSB about compliance.
- Mutually agreed time period within 45 days.
- Arbitration within 90 days. (A.21)
- Compensation and suspension of concessions – 21.3 – mutually acceptable compensation.



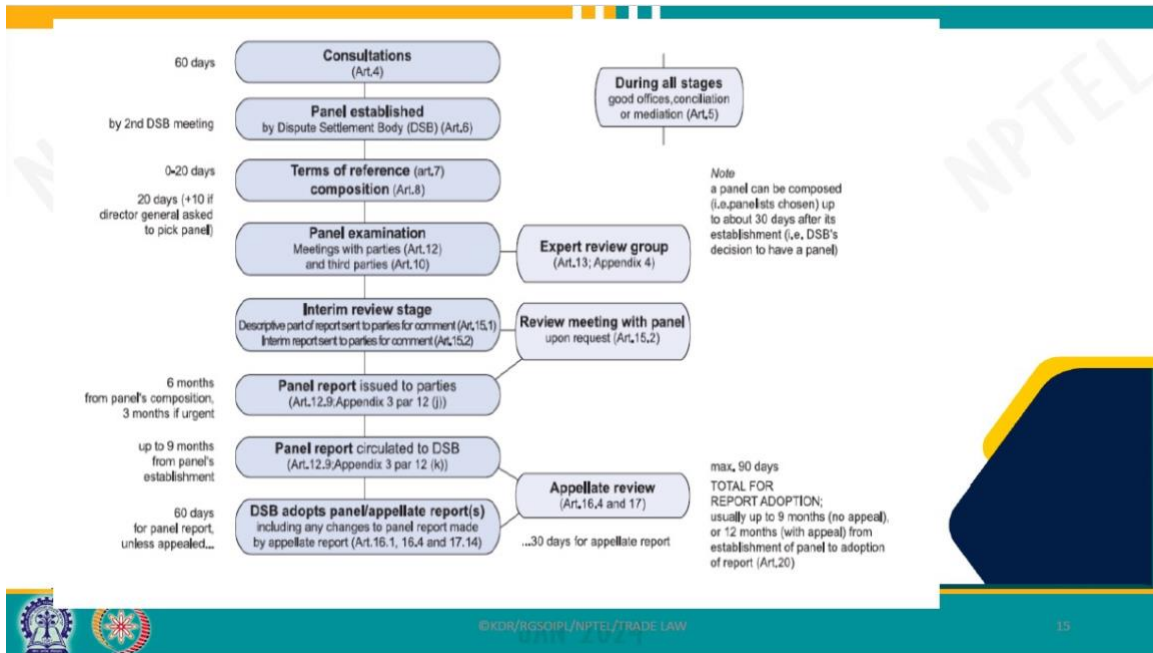
And also the duties of the panel which we said what the appellate body clearly said their powers their powers are very limited to the extent of the working procedures. And article 11 clearly says what they have to do article 11 says the panel should make an objective assessment of the facts of the case and applicability and conformity with the agreements. So, the panel really look into the facts of the case as well as the law violation of the

provisions. So, and ask the member countries to in compliance with the procedures. So, mutually agreed solutions can any point of time they can come out with mutually agreed solutions. So, if the parties have any dispute with regard to the implementation period they can go on with arbitration procedures under article 21. And in case of non-compliance a review panel will be formed and the review panel can give compensation under article 21.3 or order for suspension of concessions. We talked retaliation, cross retaliation the members the review panels have the powers to go on with retaliation and you know even cross retaliation.

Arbitration, A.21.3

- **The parties should accept the first arbitration and the parties shall not seek a second arbitration.**
- **the DSB shall inform on the arbitration and grant authorization to suspend concessions.**
- **A.25 – Arbitration of disputes should be promoted outside the agreement.**

So, the parties will be given only one chance of arbitration under article 21.3 not two chances. And this arbitration panel have the power to authorize suspend concessions. So, it means that arbitration panels are very powerful and there is no appeal which you can find it from the arbitration panels. So, arbitration and article 25 says that so, this arbitration should be promoted outside, but no members will go outside and they will come back to the panel and the panels will sit as arbitrators. Even though they are other mechanisms of arbitration that they could use.



We already saw this particular the flow of process consultations panels then the terms of reference will be given then panel of you know the panel will be given and then the panel will examine or they you know adjudicate the case they come with an interim review, then they come out with the final report, the panel report then panel report will be circulated to the members and finally, the panel report is adopted by the DSP members. And if the report is adopted if the parties are not going for appeal otherwise the parties go with their own appeals. So, the total time frame is mentioned, clearly mentioned.

Stages	Before first hearing	each side in the dispute presents its case in writing to the panel.
	First hearing: the complaining country and defence:	the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.
	Rebuttals	the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
	Experts	if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
	First Draft	he panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

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And first stage is the hearing of the complaining parties and there can be rebuttals by the opposite party then we said that the panel have the powers to appoint scientific or other technical experts to consult the experts and to take advisory opinions of this particular experts. Then the first draft of the report will be ready.

Different stages	
Interim Report	The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
Review	The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.
Final Report	A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.
The report become ruling	The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

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And then interim reports will be issued. Then the period of review 2 weeks time is given then the final report and the report become a ruling once it is adopted by the DSB this is the panel reports.

Written Submissions
As a rule, the parties to the dispute make two written submissions to the panel and the panel meets twice with the parties on the substance of this dispute. Exceptionally, panels convene additional meetings with the parties. The timetable for the panel process will set out precisely when the written submissions are due and when the panel meetings will take place. The parties are bound to respect the deadlines for their written submissions.

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And written submissions the members are given ample opportunity of two written submissions to the panel and the panelist meet twice the parties to the dispute. So, and accept and definitely the parties the deadlines are to be met by the parties.

Panel Report

- **The deliberations of the Panel are confidential.**
- **The Panel Reports are drafted in the absence of parties.**
- **The Panellists meet and draft the report.**



And then all the deliberations of the panel are confidential and the panel report is drafted in the absence of parties it means that it is a completely independent adjudicatory body without any kind of interference from the parties and the panelist they used to met and draft the report.

Interim Review

Once the panel has completed a draft of the descriptive (i.e., the factual and arguments) sections of its report, the panel issues this draft to the parties for their comments within two weeks.⁸¹ Two to four weeks after the expiration of the time period for receipt of comments on the descriptive part, the panel subsequently issues to the parties an interim report, including both the descriptive sections and the panel's findings and conclusions. The parties are again invited to comment on the report, usually within one week. A party may submit a written request to the panel to review particular aspects of the interim report. At the request of a party, the panel may hold a further meeting with the parties on the issues identified in the written comments. Such interim review meetings are, however, rather exceptional.



And interim review is very important once the draft is complete then they look into the factual aspects and the law, the violating law and then the comments will be accepted from the parties and the comments will be considered by the panel after the interim review is done.

Final Report

The final panel report is *first issued* to the parties to the dispute and some weeks *later*, once the report is available in the three working languages of the WTO, *circulated* to the general WTO Membership. Once circulated to WTO Members, the panel report is an unrestricted document available to the public. On the day of its circulation, a panel report is posted on the WTO website (www.wto.org). Panel reports are also included in the official WTO *Dispute Settlement Reports*, published by Cambridge University Press.



And the final report is again you can see that you know in main languages WTO languages and it is circulated to the WTO membership once it is circulated to the membership. So, it is an unrestricted document once the report is circulated to the members and available to the public. So, all the panel reports are in the WTO site and the hard copies are published by the Cambridge University Press are volumes. So, all the final reports are in the public domain.

Adoption of Report or Appeal

Within 60 days after the date of circulation of the panel report to WTO Members, the report is adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after they have been circulated.



So, if the report if any party is want to go for appeal within a period of 60 days its intention is given to the panel and then they go on with the appeal. So, the within 20 days of time the reports once circulated they have to show their intentions they have to you know send their intentions for appeal to the panel.

Appeal Stage

If a panel report is appealed, it usually is not discussed in the DSB until the time the Appellate Body report is discussed. The panel report will then be adopted by the DSB, as upheld, modified or reversed by the Appellate Body. If a panel report is not appealed, the DSB will consider and adopt the report within the period between day 20 and day 60 after the circulation of the report. The DSB adopts the report by reverse consensus. The adoption is therefore quasi-automatic.



And the appellate stage, the appellate body considers the appeal and gives the final appellate body report and we will see in the next class.

Adoption of Report

The adoption of the report will be put on the agenda of DSB meeting scheduled within the period between day 20 and day 60 after the circulation of the report. If no DSB meeting is scheduled in that period, a meeting of the DSB is held specifically to consider and adopt the report. Only WTO Members, and not the WTO Secretariat, may put the adoption of a panel report on the agenda of a DSB meeting. If no Member puts the adoption of a report on the agenda, the report will not be adopted and will therefore not become legally binding. To date, this only happened once.⁸³

So, adoption of the report here also is very important. So, the nobody have only again the WTO members meet together and automatically it is adopted on negative consensus basis and once it is adopted by the DSB and the report is legally binding on the members. And so, as I told you if the report is not going to be adopted if there is no complete negative consensus as it is reported that only once it is happened in the entire WTO period the report adoption is not happened.

Rights of Parties

When the DSB considers and debates the panel report, all Members, including the parties to a dispute, have the right to participate fully in the consideration of the report. Members that have objections to a panel report may give written reasons to explain their objections, which will be circulated to other Members.⁸⁴ Generally, the winning party will briefly praise the panel while the losing party will be more critical and lengthy, often repeating the legal and factual arguments submitted to, but rejected by, the panel. The views on the panel report expressed by the parties and other Members are fully recorded in the minutes of the meeting. The minutes of DSB meetings are initially restricted documents but are eventually made public.

So, the rights of the parties are very clearly mentioned, a right to fully participate in the process. So, giving written submissions, oral submissions and making objections and also after the interim review report is circulated the comments also is to be submitted. So, the panel report is, the ample opportunity is given to the parties for submitting their views.

Special Provisions for Developing Countries

With regard to consultations with a view to reach a mutually acceptable solution, Article 4.10 of the DSU provides that during consultations WTO Members should give special attention to the particular problems and interests of developing country Members. Article 12.10 of the DSU adds to this that in consultations on a measure taken by a developing country Member, the parties to the dispute may agree to extend the 60-day time frame for consultations. If the parties cannot agree on such extension, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long.



And we always say that there are special provisions which you can find it for the developing countries and there is special provision here also you can see. But what kind of special concessions will be given to the developing countries is not clear. So, the provision says that the consultation time consultation time special consultation to be given to the developing country members their problems their interest, but even though it is a hard law provision most of the developed countries consider it as a soft law provision and they do not give any special concession to the developing countries. So, it is always the special and differential treatment become only in the papers.

Special Provisions for Developing Countries

With regard to the composition of panels, Article 8.10 of the DSU provides that in a dispute between a developed and a developing country Member, the panel must, if the developing country Member so requests, contain at least one panelist from a developing country. In the vast majority of disputes involving developing countries, nationals from developing country Members have served on the panel.⁸⁹



So, we talked about special and differential treatment.

Special Provisions for Developing Countries

With regard to the panel process, Article 12.10 of the DSU provides that in a dispute concerning a measure of a developing country Member, the panel shall accord sufficient time for a developing country Member to prepare and present its arguments. In *India – Quantitative Restrictions*, India requested from the Panel additional time in order to prepare its first written submission. Referring to the DSU's strict time frame for the panel process, the United States objected to the request.



And in many cases for example, the India quantitative restrictions case India requested for the panel. So, additional time as a special and differential treatment and additional time in order to prepare its first written submission. So, United States actually objected to the request of India. So, even there is a provision article 12 very clearly says that special consideration should be given to the developing countries, but mostly the developed

countries rejects as I told you in India the US made objections to for some additional time for submitting written submissions.

Special Provisions for Developing Countries

With regard to the panel report, Article 12.11 of the DSU provides that where one or more of the parties is a developing country Member, the report of the panel must explicitly indicate the form in which account has been taken of relevant WTO provisions on differential and more-favourable treatment for developing country Members which have been raised by the developing country Member in the course of the dispute settlement procedures.⁹¹

States objected to the request.



Special Provisions for Least Developed Countries

With regard to the least developed countries, Article 24.1 of the DSU provides that particular consideration must be given at all stages of dispute settlement procedures and, therefore, also during the consultations and panel process, to the special situation of least developed countries. WTO Members are required to exercise due restraint in initiating dispute settlement proceedings against least developed countries. As noted above, to date no dispute settlement proceedings have been initiated against any least developed country Member.

States objected to the request.



And as I told you these special provisions even though there are lot of special provisions in other agreements also these provisions the developed countries do not give any kind of concessions to the developing countries. So, it is always considered as a dead letter.

Conclusion

- **The dispute settlement system is the cornerstone of the world trading system.**
- **Strongest dispute resolution mechanism.**



So, when we consider the dispute settlement as a panel you know the panel is the third party adjudicatory independent body independent preliminary body in the dispute settlement. The contribution of panels so, far since 1995 is immense and the contribution of panels and its impartiality and transparency made it is very important for the independence of these entire dispute settlement system and the reliance on this particular system by the member countries overwhelming reliance of WTO members in this particular dispute settlement body. So, there is so, far there is no complaint neither of corruption nor of partiality came to the WTO dispute settlement panels. So, the panel members are highly qualified experienced people those who dealt with the cases and mostly the provision very clearly says that no member country the panelists can sit in their own represent their own country. So, always the other country members sat for the dispute resolution which increases the credibility of the system which increases the predictability of the WTO dispute settlement system. So, thus the panel formation is absolutely different from the GATT in WTO and there are written rules and working procedures for the panels and the panels can only look into the violations and related facts and also the violated laws and the panel do not have powers to exceed the working procedures. So, there is a clear framework of working of the panel and within the written rule based system. So, I would say that in conclusion and panel is working so, far very well within the WTO dispute settlement system and unfortunately only panel is there now in the WTO dispute settlement system. So, in the next class we will talk about the death of WTO appellate body and how the appellate body worked so, far.

Thank you.