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Jayant Raghu Ram, *Cracks in the “Crown Jewel”—Whether “Prompt Settlement” of Disputes?*

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CRACKS IN THE ‘CROWN JEWEL’—WHITHER ‘PROMPT SETTLEMENT’ OF WTO DISPUTES?

BY JAYANT RAGHU RAM*

In a span of just two decades, the World Trade Organisation (WTO) has issued a remarkable number of two hundred plus panel reports and 140 plus appellate reports. Members’ compliance pursuant to these decisions, though not perfect, has also been commendable. For such reasons, the dispute settlement mechanism (DSM) has rightly been hailed as the WTO’s ‘crown jewel’. However, in the recent past, the DSM’s mandate of promptly settling disputes within the stipulated timeframes has come under tremendous pressure, resulting in major delays. Such delays present a serious systemic issue and undermine the objective of the DSM to promptly settle disputes. This paper undertakes a detailed analysis of the delays being faced at the panel and appellate stage. It analyses the delays in issuing/circulating panel and appellate reports right from 1995 till June 2018. Apart from this, it also discusses suggestions for remedying the systemic delays, such as restructuring the panels and the Appellate Body; revising the DSU timelines; and considering retrospective and provisional remedies. The preliminary conclusions of this paper are that while there is no denying that the DSM is under significant pressure, the situation has not yet reached a full-blown crisis. In fact, delays are common across all dispute settlement mechanisms, whether domestic or international. The DSM could, however, benefit from much-needed reforms given that the demands

* The draft version of this paper was completed in November 2017 when I was engaged as Research Fellow (Legal), Centre for WTO Studies, Indian Institute of Foreign Trade. Since then, this paper has been revised based on the available data from the latest disputes and comments received from different sources. All views and opinions reflected in this paper are solely mine and do not represent those of anyone else. I remain responsible for errors, if any, which I suspect could be highly possible on account of the huge numerical data that I have attempted to crunch. I am grateful to Abhijit Das, Jan Bohanes, and especially Graham Cook, for their insightful and very helpful comments on draft versions of this paper. I am also grateful to Abhijit Das for providing institutional support and constant encouragement in all my writing endeavours. My special thanks to Nithya Fenn for her very meticulous editorial assistance. I may be contacted at [jayant.raghuram89\[at\]gmail.com](mailto:jayant.raghuram89[at]gmail.com).

placed on it have outgrown its original design, structure, and capacity, all of which need to be attuned to meet today's requirements.

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I. INTRODUCTION

In 2015, the number of disputes initiated by Members of the WTO under its dedicated DSM crossed the five hundred milestone.¹ This is a remarkable achievement for an organisation that is younger than other international institutions such as the International Court of Justice or the Permanent Court of Arbitration. The DSM's current track record is also impressive for it verily overshadows that of its predecessor DSM under the General Agreement on Tariffs and Trade (GATT) which was functional for close to half a century.

A key contribution of the Uruguay Round negotiations, many factors can be attributed to the DSM's design as reasons for its considerable success. A factor that Uruguay Round negotiators probably conceived as vital to the DSM's ability to

¹ *Dispute Settlement, WORLD TRADE ORG.*, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Nov. 15, 2018).

effectively adjudicate disputes was not just a rule-based system of settling disputes but also one that was time-bound. In fact, timelines stipulated for various stages of the dispute settlement process under the Dispute Settlement Understanding (DSU), starting right from consultations to the implementation and retaliation stages constitute one of the important features of the WTO's DSM. More importantly, panels and the Appellate Body (AB) are required to complete adjudicating disputes and present their findings to the Dispute Settlement Body (DSB) within a prescribed timeline. The drafters of the DSU seemed to have been mindful of the need for certainty and to ensure that disputes did not drag on endlessly for years as is the case with certain domestic systems of dispute settlement.

While much has been said about the DSM's success, its intended objective of 'promptly settling' disputes has come under the scanner, considering its track record in the recent years. Though Article 20 of the DSU envisages that WTO disputes should ideally take not more than nine to twelve months for completion of adjudication, disputes in the recent past have started to take an average of two or more years. The delay is being felt both at the panel and the appellate stages, where various factors have started to bog down the pace at which disputes ought to be resolved. The pangs of these delays have become more pronounced in some recent anti-dumping disputes, where panels, even after composition, have been unable to commence their proceedings owing to shortage of WTO secretariat staff to assist them.

The systemic implications of delays in settling disputes at the WTO are grave. Left unchecked, a WTO Member could maintain domestic measures violating WTO law for years and thus set an unhealthy precedent by encouraging other Members to do the same. The seriousness of the issue has even coaxed the WTO Director-General to take note of the issue and take certain remedial measures such as increase in staff strength. However, in order to remedy the existing situation, much more may need to be done.

The issue of delays has also been the focus of a number of scholarly papers some of which have been published recently and some others in the past. This highlights the attention that the situation at the DSM has garnered in recent years. In fact, the issue at the WTO has garnered so much importance that in June 2017, the AB organized a special event to mark the release of its 2016 Annual Report. As was pointed out by the 2017 AB Chair, Ujal Singh Bhatia, it was the first time the AB

organised a special event, the reason being to highlight the challenges being faced by the AB including that of delays and the increased workload.²

The objective of this paper is to provide a more detailed understanding of the delays plaguing the WTO DSM. For the purposes of this paper, I have analysed the data obtained from the various statutory communications issued by the panels and the AB right from 1995 till June 30, 2018 (the period of review). I have examined the data from these communications to analyse the quantum of delays at various adjudicatory stages and also to identify the reasons for these delays.

The structure of this paper is as follows. Part II discusses the negotiating history of timelines under GATT dispute settlement. This is followed by Part III which presents a statistical overview of disputes at the WTO, covering stages from consultation to the appellate stage. This Part is intended to put the article in perspective and quantify the delays that are the subject of discussion. Having identified the delays and their quantum, it becomes necessary to understand the reasons for the delays. Part IV identifies and discusses these reasons. Part V discusses the systemic implications of delays for the WTO as such. This is followed by Part VI which advances some suggestions for addressing the current situation. After the conclusion in Part VII, there are five Annexes which tabulate the time elapsed in each of the disputes at the original, compliance, appellate, reasonable period of time (RPT) and retaliation stages.

II. A BRIEF (NEGOTIATING) HISTORY OF TIME (LINES) UNDER THE DSU

A. Timelines Under GATT Dispute Settlement

The timelines prescribed in the DSU are not a unique contribution of the Uruguay Round. Rather, they are a legacy of the GATT era instruments on dispute settlement. Though the dispute settlement provisions of the GATT were very rudimentary and did not contain provisions stipulating timelines, the Contracting Parties progressively established and codified emerging practices on settlement of disputes.³

² UJAL SINGH BHATIA, THE PROBLEMS OF PLENTY: CHALLENGING TIMES FOR THE WTO'S DISPUTE SETTLEMENT SYSTEM (June 8, 2017), https://www.wto.org/english/news_e/news17_e/ab_08jun17_e.pdf [hereinafter BHATIA].

³ *Historic Development of the Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm (last visited Dec. 9, 2018).

One of the first Contracting Party Decisions in which timelines for adjudication were prescribed was the 1966 Decision on Procedures under Article XXIII.⁴ Paragraph 7 of this Decision prescribed a timeline of sixty days for a panel to submit its report, from the date of referral to it. However, this Decision pertained only to disputes between developed countries and less-developed countries and not across the board to disputes between all Members.

Subsequent attempts at developing provisions pertaining to timelines were made in the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (1979 Understanding)⁵ and its Annex (the Annex).⁶ Paragraph 20 of the 1979 Understanding recognised that “the time required by panels would vary with the particular case”. However, it stated that, “panels should aim to deliver their findings without undue delay, taking into account the obligation of the [Contracting Parties] to ensure prompt settlement [of disputes]”. Paragraph 20 further stated that in cases of urgency, the panel should deliver its findings normally within three months of panel establishment. The language of paragraph 20 was rather hortatory.

The footnote to paragraph 20 of the 1979 Understanding makes a reference to the Annex. Clause (ix) of paragraph 6 of the Annex records that, “the [Contracting Parties] never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ[ed] as to their complexity and their urgency”. Clause (ix) goes on to record that, however, “in most cases panel proceedings have been completed within a reasonable period of time, extending from three to nine months”.⁷

The subsequent 1982 Decision,⁸ also contained provisions pertaining to timelines. However, these provisions were rather similar to the 1979 Understanding and did not contain anything incremental. For instance, paragraph (vi) of the 1982 Decision stated nothing more than that panels were expected to present their findings without undue delay, as provided in paragraph 20 of the 1979 Understanding. The substantial contribution of the 1982 Decision was, however, in paragraph (vi) which obliged the panels to inform the General Council if a report

⁴ *Decision of 5 April 1966 on Procedures Under Article XXIII*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/a2s1p1_e.htm (last visited Dec. 9, 2018).

⁵ Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. L/4907.

⁶ *Id.* at 205.

⁷ *Id.* at 208.

⁸ Ministerial Declaration of 29 November 1982, *The Decision on Dispute Settlement*, Nov. 29, 1982, GATT B.I.S.D. 29S/13 [*hereinafter* 1982 Decision].

could not be made within the aforesaid period and to submit the report as soon as possible thereafter.

The next instrument on dispute settlement was the 1984 Decision.⁹ Though this Decision also did not contain any additional substantial provisions, the introductory paragraphs are very interesting and relevant in the present context. The second introductory paragraph records the lack of timely completion of panel work as one of the procedural challenges related to the panel process encountered in GATT dispute settlement practice. The introduction further notes that ‘although the 1979 Understanding provides a guideline of three to nine months to complete the panel's work, experience showed that these timelines were seldom met’.

The 1984 Decision records that the Contracting Parties recognised the importance of procedural improvements in the GATT dispute settlement practice and therefore decided that panels should continue to establish their own working procedures and, where possible, provide the parties to the dispute with a proposed calendar for the panel's work at the outset. This step, among others, was agreed to in the 1984 Decision on a trial basis for one year.

B. *Uruguay Round Negotiations*

When the Uruguay Round negotiations were launched in 1986, one of the objectives spelt out by the Punta del Este Ministerial Declaration was the improvement and strengthening of the rules and the procedures of the dispute settlement process in order to ensure prompt and effective resolution of disputes to the benefit of all Contracting Parties.¹⁰

During the Uruguay Round, statutory deadlines were a rather important element of negotiations on dispute settlement.¹¹ It is commonly understood that one of the main factors behind negotiating a rules-based system of settling disputes at the WTO was to curb the United States' unilateral measures authorised under its Trade Act of 1974 against alleged trade violations by its trading partners.¹² Against this background, time-bound adjudication of disputes was agreed to *quid pro quo* for the

⁹ Decision on Dispute Settlement of 30 November 1984, Nov. 30, 1984, GATT B.I.S.D. 31S/9 [*hereinafter* 1984 Decision].

¹⁰ GATT, Ministerial Declaration on the Uruguay Round, MIN. DEC., at 6 (Sept. 20, 1986).

¹¹ Louise Johannesson & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995–2016: A Data Set and its Descriptive Statistics*, 51(3) J. WORLD TRADE 357, 367 (2017).

¹² Petros C. Mavroidis, *Dispute Settlement in the WTO. Mind Over Matter*, 6 (Colum. Pub. L. Research Paper No. 14-500, 2016), <https://ssrn.com/abstract=2727131>.

United States to abandon its aggressive unilateralism.¹³ Another important aspect of the negotiations was that the timelines stipulated in the DSU closely tracked the timelines in the Section 301 process under the United States Trade Act of 1974.¹⁴

During the negotiations, many Contracting Parties agreed that the time limits for the panel proceedings, as well as for the dispute settlement process as a whole, should be fixed more precisely and strictly.¹⁵ Proposals for timelines for the panel process varied from six to nine months from panel establishment.¹⁶ Some negotiators proposed an overall deadline of not more than twelve months for disputes which involved complexity. Yet, some others proposed that some flexibility be maintained in the panel process by allowing the timelines for panel proceedings to be established pursuant to agreement between the disputing parties and the panelists.¹⁷

Substantial progress in the Uruguay Round was made at the 1988 Montreal Mid-Term Review where the Contracting Parties reached a decision on, *inter alia*, Improvements to the GATT Dispute Settlement Rules and Procedure.¹⁸ The Contracting Parties also decided to apply these improvements on a trial basis from January 1, 1989 to the end of the Uruguay Round.¹⁹ The Contracting Parties seem to have had the foresight to experiment with these improvements for carrying out revisions before the Uruguay Round's conclusion, before casting them in stone. Under this decision, there was substantial maturity of provisions related to timelines in comparison to the previous decisions. Contracting Parties agreed upon provisions on clear and specific timelines identical to Article 12 of the DSU. These included provisions which imposed the obligation on the panels to inform the GATT Council of the delay.²⁰ Without going into a more detailed discussion of developments from this point, it would suffice to say that these provisions eventually found their way into the DSU in its current shape.

¹³ *Id.*; Johanneson & Mavroidis, *supra* note 11.

¹⁴ Amelia Porges & John H. Jackson, *The WTO and the New Dispute Settlement*, 88 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 131, 133 (1994).

¹⁵ Negotiating Group on Dispute Settlement, *Note by the Secretariat (Revision): Summary and Comparative Analysis of Proposals for Negotiations*, MTN.GNG/NG13/W/14/Rev.2, at 20 (June 22, 1988).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Multilateral Trade Negotiations the Uruguay Round, *Trade Negotiations Committee Meeting at Ministerial Level, Montreal*, MTN.TNC/7 (MIN), at 26 (Dec. 9, 1988).

¹⁹ *Id.*

²⁰ *Id.* at 31.

III. STATISTICAL OVERVIEW OF DISPUTES AT THE WTO

For the purposes of this paper, I have examined information in **188 original panel disputes, thirty-seven compliance panel disputes, 137 appeals, thirty-two RPT arbitrations and thirteen retaliation arbitrations**. I have analysed all communications issued in disputes right from 1995 till June 2018. Information pertaining to these disputes has been collected from the WTO website and is being maintained by me in an Excel database.²¹

It may be noted that in determination of the quantum of delays, I have excluded those disputes which were settled by the parties before the particular tribunal concluded its proceedings. However, when analysing the reasons for delays, I have factored in these settled disputes.

Before proceeding with the analysis, it would be pertinent to note a few points regarding the methodology adopted in this paper. For a more nuanced analysis, I have segmented disputes in all categories (except RPT and retaliation arbitrations, due to their limited numbers), on a five-year basis from 1995. There are thus five data sets: 1995-99, 1999-2000, 2000-04, 2005-09, and 2010-14, and one set of four years—2015-18. Panel reports have been segmented based on the date of panel establishment, and appeals on the basis of the notification of appeal

For avoiding double counting of disputes, where multiple panel reports pertaining to the same dispute have been issued on account of multiple complaints against the same respondent, I have considered them as a single dispute for the purposes of this paper. I have followed this norm for disputes such as *EC — Bananas* and *Australia — Plain Packaging*. Also, to ensure appropriateness in calculations, there are certain disputes where the delays in adjudication are so inordinate that their inclusion skewed the average number of days of delay so determined. Instances of these *outlier* disputes are *US/EC — Aircraft* and *Australia — Plain Packaging*. Therefore, I have presented two sets of calculations—one excluding these outlier disputes and another including them.

This Part has five sub-parts. In the first sub-part, I provide a brief overview of disputes at the consultations stage. In the second, third, fourth, fifth, and sixth sub-parts, I engage in an analysis of original panel disputes, compliance panel disputes,

²¹ The Centre for WTO Studies, IIFT has generously agreed to host this database on its website at www.wtocentre.iift.ac.in. The link to the database will soon be active in the coming days and will be updated by me on a regular basis thereafter.

appellate reviews, RPT arbitrations, and retaliation arbitrations respectively. In each of these sub-parts, there are three sections.

In the first section, I discuss the applicable provisions in the DSU that stipulate timelines for the disputes of a particular category. Also, while the DSU is the general legislation dealing with disputes at the WTO, other WTO agreements have their own dispute settlement related provisions that become applicable when a dispute under that particular agreement is initiated. I will also be discussing these provisions.

In the next section, I engage in a temporal analysis of disputes based on the data obtained from statutory communications. In this section, I have also attempted to calculate the average delays that have resulted in each data set.

In the third section, I have filtered the different reasons for delays given by the panels and the appellate divisions in their respective communications.²² For this purpose, I have also considered those disputes which have been settled. Further, where there are multiple communications in a dispute, I have avoided double-counting of overlapping reasons.

One drawback that I have faced in this sub-part is that the wordings of some of the reasons are not uniform and in some instances are vague. Therefore, readers are cautioned that I have exercised some discretion in filtering the reasons for delays. While great care has been taken to ensure their accuracy, this paper's statistics on this aspect should be taken with a *handful* of salt.

Under the provisions of the DSU, if the panels and the AB are unable to meet the stipulated deadlines in issuing reports, they have to intimate the DSB of the delay and also provide reasons for the same. For the purposes of this paper, I have reviewed the information in the statutory communications issued by the panels and the AB whenever they miss the statutory deadlines. These communications have been downloaded directly from the WTO's website. Besides admitting to the fact that these disputes have missed the deadlines, these communications also provide information regarding the deadlines, the reasons for the delay, and the date by which the panel or the AB expects to come out with the report. One limitation that I have faced in this regard is that I have not been able to find the statutory communications on the WTO website in certain instances where the AB or the panel has missed the deadline.

²² I have not carried out this discussion and analysis in the sub-part on RPT and retaliation arbitrations since the DSU does not oblige these arbitrators to inform the DSB in case of delays.

In the course of preparing this paper, I have also faced certain other limitations. One of these was that for a number of disputes, the date on which the final report was *issued* to the parties *has not been mentioned* in the final report or elsewhere. The date of issue of the final report to the parties is important for determining delays at the panel stage. Therefore, in the absence of the same for a number of disputes, I have been constrained to construct a hypothetical date for when the panel might have issued the final report to the parties. This proxy has been constructed on the basis of the date of circulation of the panel report from which I have subtracted a reasonable period of twenty days. Fortunately, all original panel reports issued from November 2008 onwards clearly mention the date of issue of the final report.

A. Consultations

Consultations mark the first stage of the formal dispute settlement process at the WTO. It is easy to ascertain the number of disputes initiated at the DSM on the basis of the last docket number (DS) and hence the number of consultations requested at the WTO. As was mentioned at the beginning, more than five-hundred disputes have been initiated at the WTO, meaning more than five-hundred consultation requests have been made.

As per Article 4.7 of the DSU, parties are ordinarily expected to settle disputes within sixty days of the consultations request. Failure to settle the dispute at the consultations stage within this period entitles the complaining party to request the DSB to establish a panel to adjudicate the dispute.

The nature of consultations is such that they are bilateral in nature. Even though consultations have to be completed within sixty days, the complainant may agree to more time if a mutual solution may be achieved. This does not affect the timelines of the subsequent stages of the DSM since consultations are bilateral in nature. Thus, there are no ‘delays’ as such at the consultations stage.

B. Original Panel Proceedings

1. Timelines Under the Various Agreements

The general rules concerning settlement of WTO disputes are contained in the Dispute Settlement Understanding. However, there are also special rules of dispute settlement which apply in case of disputes concerning some of the covered agreements. Both the general rules and the special rules are discussed in this sub-part.

a. Timelines Under the DSU

Unlike permanent courts, WTO panels are *ad hoc* bodies established by the DSB pursuant to a request by the complainant. Also, unlike permanent courts, the composition of panels is *ad hoc* and determined by the disputing parties. The stage of panel composition begins right after panel establishment and is facilitated by the WTO Secretariat.

Interestingly, the DSU does not prescribe a definitive deadline by when the panel should be composed, though either of the disputing parties may request the Director-General to determine the composition in case they are unable to do so within twenty days of panel establishment.

Provisions stipulating timelines for panel proceedings are contained in Article 12 of the DSU. Article 12 stipulates two deadlines: first from the panel composition stage (first statutory deadline), and second from the panel establishment stage (second statutory deadline). Under Article 12.8, the time period for a panel to conduct its examination until the final report is issued to the disputing parties cannot exceed six months from the date of its composition and establishment of terms of reference (first statutory deadline). Article 12.9 further provides that in no case can the period from the panel's establishment to the report's circulation to Members exceed nine months (second statutory deadline). It may be noted that the first statutory deadline deals with the issuance of a panel report while the second statutory deadline deals with the circulation of a panel report.

Under Article 12.9, if a panel considers that it cannot issue its report within the first statutory deadline, it is obliged to inform the DSB of the reasons for the delay together with an estimate of the period within which it will issue its report. It should be noted that Article 12 does not contain an obligation for the panel to inform the DSB or any other body in case it misses the second statutory deadline.

Another aspect that has implications for the timelines at the panel stage is that the DSU implicitly recognizes the possibility of both parties settling the dispute in the course of panel proceedings. As per Article 12.12 of the DSU, if a complainant so requests, the panel may suspend its work at any time for a period not exceeding twelve months. In case of such suspension, the DSU requires the exclusion of such time periods for assessing the statutory deadlines.

The DSU also stipulates specific timelines in disputes of urgency including those which concern perishable goods. According to Article 4.9 of the DSU, the panels and the AB are required to make every effort to accelerate the proceedings to the greatest extent possible. Even though Article 4.9 uses the word 'shall', this is nonetheless a best endeavour clause, since the parties, the panels, and the AB are required to 'make every effort possible'. Article 12.8 of the DSU states that in cases of urgency before the panel, the panel shall aim to issue its report to the parties to

the dispute within three months from the date of panel composition. However, strangely no such timelines have been stipulated for appellate proceedings.

An overall timeframe for disputes is provided in Article 20 which stipulates that unless otherwise agreed to by the disputing parties, the period from panel establishment until the adoption of the panel/AB report, cannot exceed nine months, or twelve months in case of an appeal.

It is important to note that the DSU does not contain any provisions penalising the panelists or anyone else for missing the deadlines nor does it spell out any consequences of the failure to stick to the timelines. Rather, the drafters of the DSU seem to have been mindful of ensuring that the timelines stipulated in the DSU did not unduly pressurise the panelists which is probably why Article 12.2 states that panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

b. Timelines Under the Agreement on Subsidies and Countervailing Measures

With regard to timelines, in addition to the ones stipulated in the DSU, the Agreement on Subsidies and Countervailing Measures (ASCM) prescribes certain rules. If a complaint is initiated against another Member's prohibited subsidies, then Article 4 of the ASCM Agreement is attracted. Article 4.12 of the ASCM stipulates the applicable timelines to be half of the timelines prescribed under the DSU, except where provisions of Article 4 of the ASCM prescribes a specific timeline.

One instance is Article 4.6 of the ASCM, which although does not stipulate a different timeline for issuing the final report, requires that the panel report be circulated within ninety days of the date of the panel's composition. Oddly, however, this means that both issuance and circulation will have to be within the same timeline. Also, the benchmark from when the clock starts ticking in both cases is the date of panel composition unlike in disputes initiated under other agreements, where the timeline for circulation starts from the date of panel establishment.

However, in the course of my analysis, I have found that these special rules under the ASCM have been followed only in a limited number of disputes such as *Canada — Aircraft*²³ and *US — Conditional Tax Incentives*²⁴, where the intention to comply

²³ *DS70: Canada — Measures Affecting the Export of Civilian Aircraft*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds70_e.htm (last visited Nov. 15, 2018).

with these special rules was clearly indicated by the panel.²⁵ On the other hand, in a number of other disputes initiated under Article 4, such as *US — Upland Cotton*,²⁶ and *Brazil — Taxation*²⁷, the panel has seemingly not applied these special rules.

The ASCM also prescribes special rules, in Article 7, when actionable subsidies are complained against. In such cases, Article 7.4 of the ASCM stipulates that the panel must be composed within fifteen days from the date of panel establishment. However, compliance with this rule has not been consistent. In disputes such as *EC — Commercial Vessels*, the panel was composed after this stipulated timeline.

With regard to adjudication, Article 7.5 states that the panel must circulate its report to all Members within 120 days of the date of panel composition. This rule also has not been consistently followed in certain disputes such as *EC — Commercial Vessels*. Also to be noted is that Article 7.5 conflicts with Article 4.6 discussed in the foregoing paragraph, in case prohibited subsidies are also complained against.

It is not clear why there is no consistency in the practice of following the special timelines under the ASCM.

c. Timelines Under the Government Procurement Agreement

Before its revision in March 2012, the Agreement on Government Procurement 1994 (GPA) had certain special provisions concerning timelines. Article XXII of the GPA stipulated special rules concerning settlement of disputes under the GPA. Paragraph 6 of Article XXII stipulated that the panel should attempt to provide its

²⁴ *DS487: United States — Conditional Tax Incentives for Large Civil Aircraft*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds487_e.htm (last visited Nov. 15, 2018).

²⁵ Evidence for intention to comply with these special applicable rules with regard to *Canada — Aircraft* can be found in Communication from the DSB Chairman, *Canada — Measures Affecting the Export of Civilian Aircraft: Constitution of the Panel Established at the Request of Brazil*, WTO Doc. WT/DS70/3 (Oct. 27, 1998). Evidence for the same may be found with regard to *US — Conditional Tax Incentives* in Communication from the Panel, *United States — Conditional Tax Incentives for Large Civil Aircraft*, WTO Doc. WT/DS487/4 (Sept. 30, 2015).

²⁶ *DS267: United States — Subsidies on Upland Cotton*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm (last visited Nov. 15, 2018).

²⁷ *DS472: Brazil — Certain Measures Concerning Taxation and Charges*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds472_e.htm (last visited Nov. 15, 2018).

final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date of composition. Thus, there were three deadlines for disputes under the GPA—two for issuance of the panel report (specified under the GPA itself) and one for circulation of the panel report (the ordinary rules applicable under the DSU).

However, it should be noted that paragraph 6 used the term ‘attempt’ for both obligations. Also, the beginning of paragraph 6 stated that “every effort shall be made to accelerate the proceedings to the greatest extent possible”. The provisions indicated that these obligations of the panel were rather hortatory in nature.

In my opinion, one of the reasons for faster adjudication of panel proceedings under the GPA was the nature of the government procurement process. Members must have probably perceived the importance of settling the dispute at the earliest, prior to the completion of the impugned government procurement process by the respondent Member. However, the dispute settlement provisions of the GPA were utilised only once— *Korea — Government Procurement*.²⁸ Also, these special rules concerning speedier dispute settlement of the GPA did not survive the GPA’s revision—when the GPA was revised with effect in March 2012, the special rules concerning speedier dispute settlement were removed by the parties to the GPA.

2. Temporal Analysis of Original Panel Disputes

Delays at the panel stage are not phenomena of the recent past; rather, the system has witnessed delays right from the very first panel proceeding, *US — Gasoline* (DS2), in 1995. In this dispute, it took the panel report eighty-one days more than the first statutory deadline, to be issued to the parties.

In fact, in the **first five-year set (1995-99)**, out of the **forty-eight disputes** reviewed, panel reports in over forty-one disputes missed the first statutory deadline, while panel reports in over eight disputes missed the second statutory deadline. Out of these **forty-eight** disputes, on an average, it took panels **ninety-three days** more than the first statutory deadline to issue the final report to the parties, whereas it took panels **eighty-seven days** more than the second statutory deadline to circulate the report. If I exclude *EC — Asbestos* as an outlier, the corresponding delays are of **eighty-eight days** and **eighty-one days** respectively. It took parties an average of **fifty-four days** to compose the panel.

²⁸ *DS163: Korea — Measures Affecting Government Procurement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds163_e.htm (last visited Nov. 15, 2018).

In the **second five-year set (2000-04)**, out of the **fifty-one disputes** reviewed, none of the panel reports met either the first or the second statutory deadlines. Out of these fifty-one disputes, on an average, it took panels **128 days** more than the first statutory deadline to issue the final report to the parties, whereas it took panels **158 days** more than second statutory deadline to circulate the report. Excluding *EC — Biotech*, which I have considered an outlier in the data set, the corresponding delays are of **116 days** and **144 days** respectively. It took parties an average of **seventy-nine days** to compose the panel.

In the **third five-year set (2005-09)**, there were far lesser disputes than the previous set—**twenty-seven disputes**. Out of these, only **one** dispute had the distinction of having met the statutory deadlines (both). Further, it took panels, on an average, **333 days** more than the first statutory deadline to issue the final report to the parties, whereas it took panels **379 days** more than second statutory deadline to circulate the panel report. Excluding *EC — LCA*, which I have considered an outlier in the data set, the corresponding delays are of **248 days** and **285 days** respectively. It took parties an average of **eighty-seven days** to compose the panel.

In the **fourth five-year set (2010-14)**, out of the **thirty-nine disputes** reviewed, the panel reports in only **two** disputes met the statutory deadlines (both deadlines). Out of these, it took panels, on an average, **244 days** more than the first statutory deadline to issue the final report to the parties, whereas it took panels **352 days** more than second statutory deadline to circulate the panel report. After excluding *Australia —w Plain Packaging* as an outlier in the data set, the corresponding delays are of **223 days** and **328 days** respectively. It took parties an average of **116 days** to compose the panel.

In the last data set (**2015-18**), out of the **twenty-three disputes** reviewed, none of the panel reports were issued within either of the statutory deadlines. Out of these, it took panels, on an average, **319 days** more than the first statutory deadline to issue the final report to the parties, whereas it took panels **420 days** more than the second statutory deadline to circulate the panel report. I have not excluded any outlier disputes from 2015 onwards as this is a time period in WTO dispute settlement where extraordinary delays are becoming more of a norm than the exception unlike in the previous data sets. The time it took the parties to compose panels came down to **ninety-nine days** from the previous set. It should be noted that this data set includes **seven disputes** for which the panel proceedings are **pending completion**.

Figure 1: Time Taken to Compose Panels

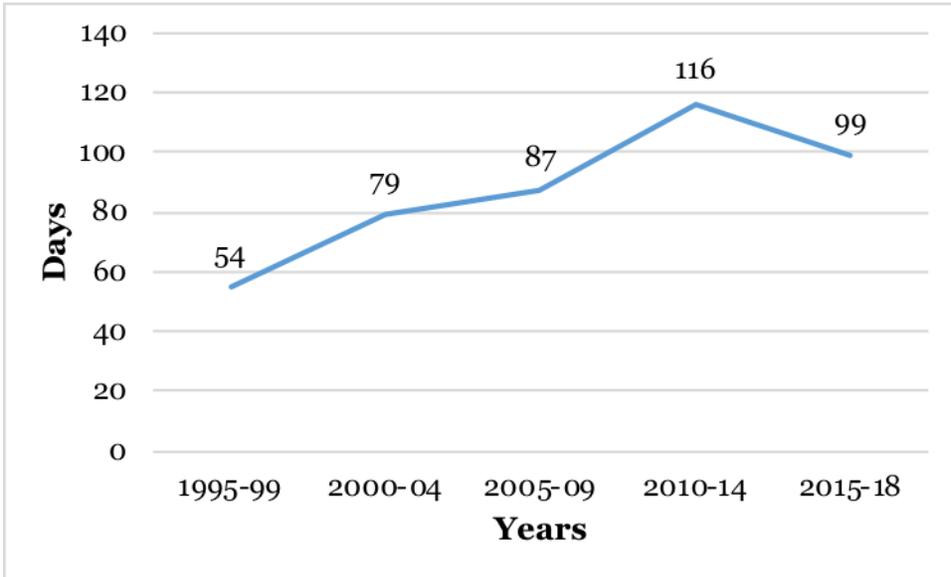


Figure 2: Time Taken by Panels to Issue Final Reports to the Parties

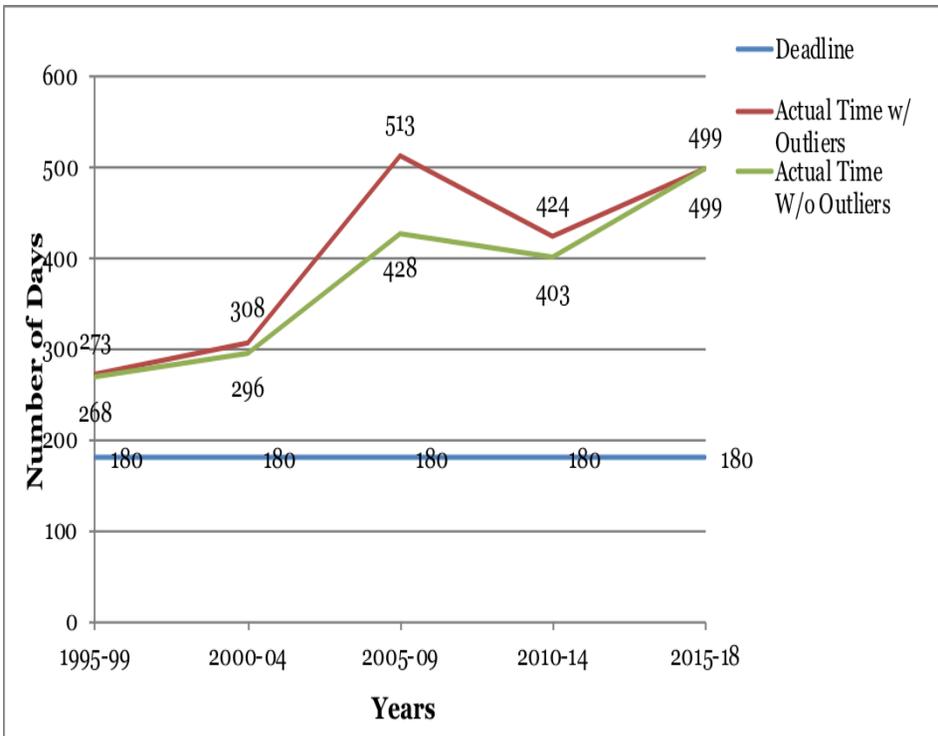
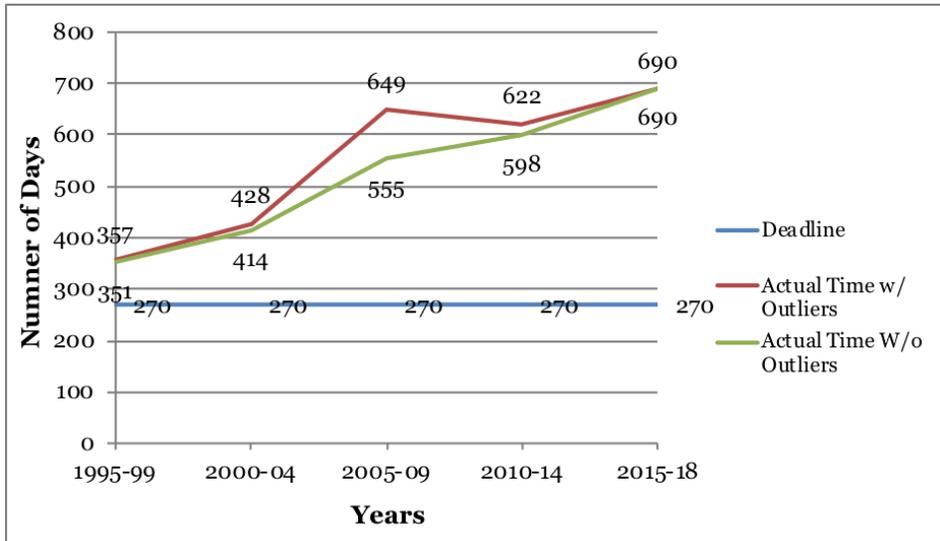


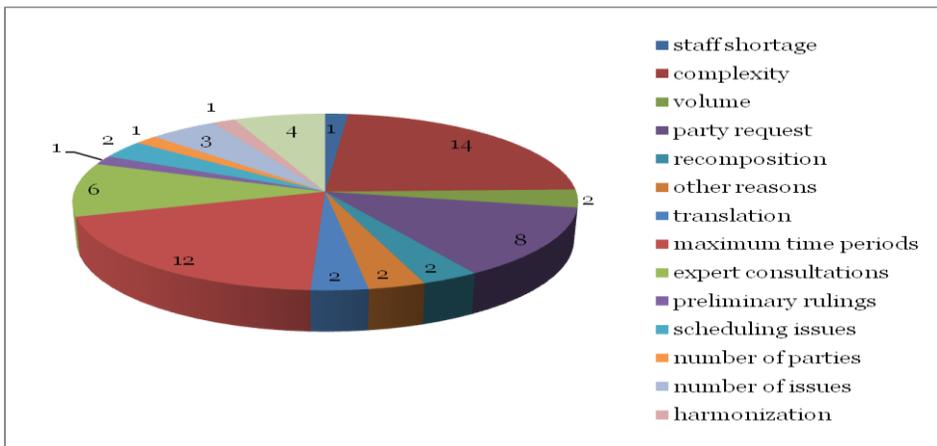
Figure 3: Time Taken by Panels to Circulate Reports



3. Reasons for Delays in Adjudicating Original Panel Disputes

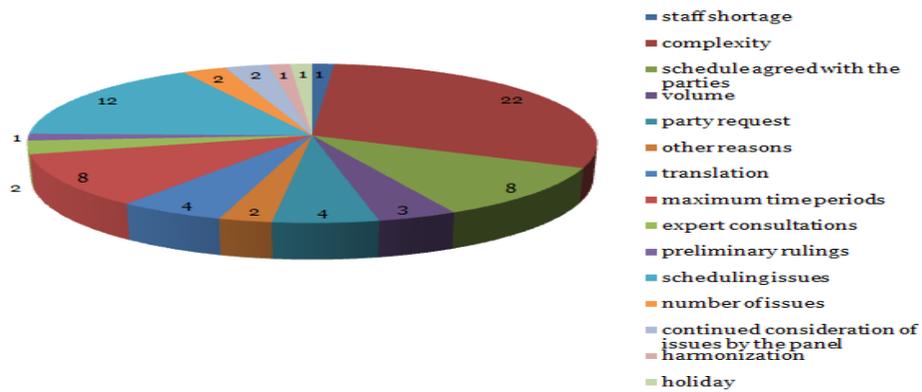
For the purposes of identifying the reasons for delays in issuing panel reports, I have sorted the disputes into five-year categories. The reasons for delays in issuing panel reports are identified in the charts below.

Figure 4.1: Reasons for Delay Cited by Original Panels in Issuing Reports (1995-99)



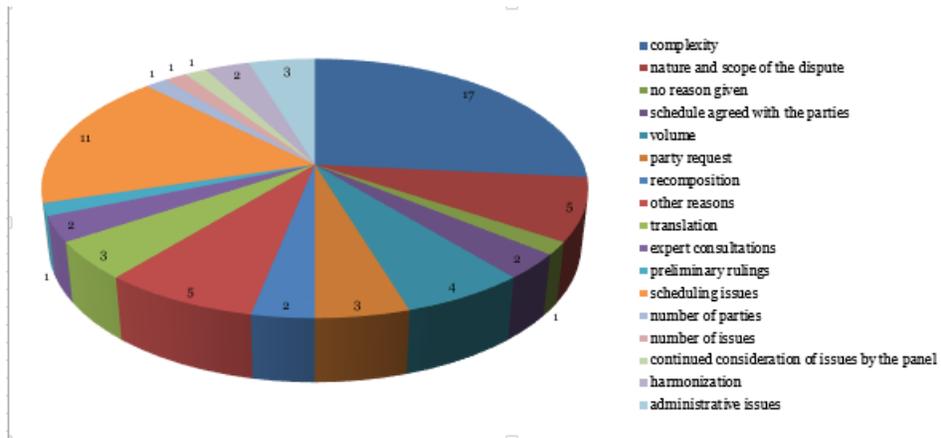
In the first five-year set (1995-99), **complexity** and **parties' requests to use the maximum available time periods** were the leading reasons for delays, being cited in **fourteen** and **twelve disputes** respectively. Other significant reasons were **parties' requests** and **expert consultations** that were cited in **eight** and **six disputes** respectively.

Figure 4.2: Reasons for Delay Cited by Original Panels in Issuing Reports (2000-04)



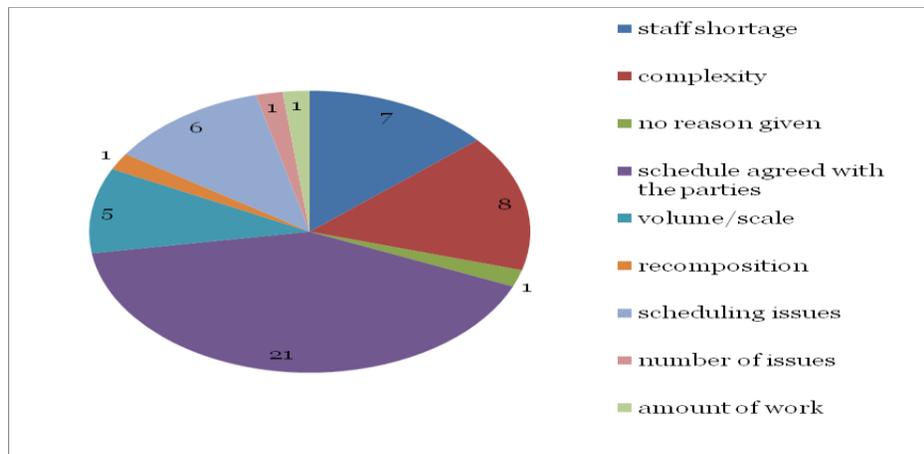
In the second five-year set (2000-04), **complexity** continued to dominate as the leading reason for delays, having nearly doubled to **twenty-two times**. **Scheduling issues**, which were cited just **two** times in 1995-99, were cited **twelve times**. The **schedule agreed on with the parties** when including the parties' wish to use the **maximum available time periods** was cited **sixteen times**.

Figure 4.3: Reasons for Delay Cited by Original Panels in Issuing Reports (2005-09)



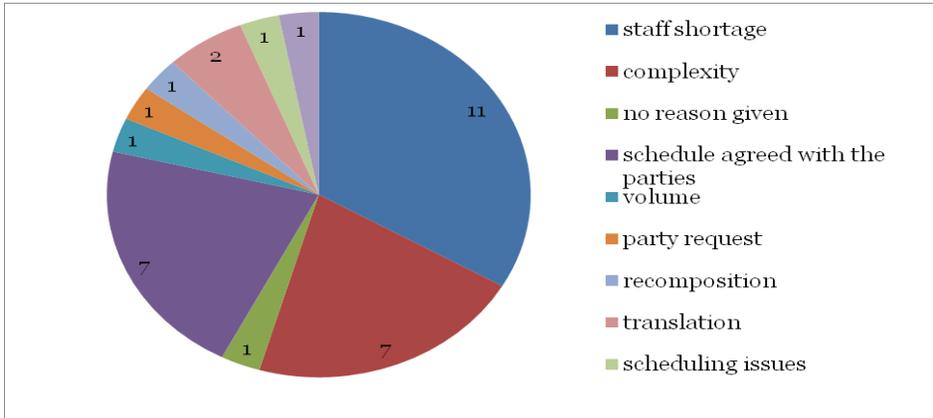
In the third five-year set (2005-09), **complexity** dominated in **seventeen disputes** followed by **scheduling issues** in **eleven disputes**. Multiple other factors such as **nature and scope of dispute**, **volume**, **party request**, etc. were cited in less than **five disputes**.

Figure 4.4: Reasons for Delay Cited by Original Panels in Issuing Reports (2010-14)



In the fourth five-year set (2010-14), the **schedule agreed on with the parties** was cited in a significant **twenty-one disputes**. **Complexity** and **staff shortage** were other major reasons which were cited in **eight** and **seven disputes** respectively. **Scheduling issues** and **volume/scale** of the dispute were cited in **six** and **five disputes** respectively.

Figure 4.5: Reasons for Delay Cited by Original Panels in Issuing Reports (2015- 2018)



In the fifth data set (2015 -18), **staff shortage** became a prominent reason for delays, being cited as much as in **eleven disputes**. This was followed by **complexity** and **schedule agreed on with the parties** being cited in **seven disputes** each. Other factors such as **translation, schedule issues, parties' requests**, etc. were cited in **one-two disputes** each.

C. Compliance Panel Proceedings

1. Timelines Under the Various Agreements

The DSU also stipulates timelines in case of compliance panel proceedings. According to Article 21.5 of the DSU, a compliance panel is required to circulate its report within ninety days of referral of the matter to it by the DSB. Similar to the obligation in Article 12.9, any delays in circulating the panel report within this timeline are required to be reported to the DSB along with the reasons for the delay and the timeline within which it expects to circulate the report.

One aspect where disputing parties save time in compliance panel proceedings is in composition: Article 21.5 of DSU gives primacy to resorting to the original panel. In theory, this would be more efficient as parties would not have to spend time composing a new panel (unless the original panelists are unavailable), and since the original panelists would be well-versed with the facts of the case, it would help in expeditious disposal of compliance dispute. Compliance proceedings also take less time as, in practice, panels usually hold just one substantive meeting with the parties unlike two in the case of original panel proceedings.

The other provisions applicable to original panel disputes such as Article 12.12 of the DSU and the special rules under other agreements such as the SCM Agreement are applicable even in case of compliance panels, even though neither Article 12 nor the SCM Agreement expressly state so.

The only other agreement to have expressly specified special rules in case of compliance disputes was the GPA. In case of compliance panel proceedings arising out of a dispute under the GPA, paragraph 6 of Article XXII stipulated that the panel should issue its decision within sixty days (of composition). No special rules were stipulated concerning circulation of the panel report or of appellate proceedings.

2. Temporal Analysis of Compliance Panel Disputes

For the purposes of this part, I have analysed **thirty-seven** compliance disputes. Unlike original panel and AB disputes, there have been a limited number of compliance disputes. Furthermore, the first time a compliance panel was sought to be established was only in 1999. However, the record of compliance panels in circulating reports within the statutory deadlines has been completely off the mark, with only one compliance panel having circulated the report within the statutory deadline, which was also the first compliance dispute, *EC — Bananas (Recourse by the EC)* (DS27).

In fact, in the **first five-year set (1995-99)**, there were only **five disputes** that were referred to compliance panels. Also, all these disputes were referred to the panel in the last year of the set (1999) only. Though none of the panels had to be recomposed (i.e., since the original panelists were available), the formalities in composing the panels took an average of around **sixteen days**. Out of these disputes, only **one** panel report was issued within the statutory deadline. On an average, it took panels **sixty-seven days** more than the statutory deadline to circulate the report.

In the **second five-year set (2000-04)**, the number of disputes referred to a compliance panel nearly doubled to **nine**. Though only one panel had to be recomposed, the time for formalities in composing the panels remained nearly the same at an average of around **seventeen days**. However, the average time it took for panels to circulate the report beyond the statutory deadline increased to a high of **148 days**.

In the **third five-year set (2005-09)**, there were **twelve disputes** that were referred to compliance panels. Unlike the previous years, panels had to be recomposed in five disputes. Also, the average time it took to complete the formalities in composing the panels nearly doubled to around **thirty-eight days**.

With regard to the time it took for circulating the panel reports, there was no improvement: on an average, it took panels **230 days** more than the statutory deadline, nearly an eighty-day increase.

In the **fourth five-year set (2010-14)**, **only four disputes were referred to the compliance panels**, which is a drastic fall from the previous set. Additionally, unlike the previous set, the panel was required to be recomposed in only one dispute. Also, there was a substantial reduction in the time it took to complete the formalities in composing the panel: the average was around **twenty-nine days**. However, the average time it took for circulating panel reports increased to a staggering **999 days** more than the statutory deadline. It must, however, be noted that this data set covered two major *Aircraft* disputes between the EC and the US. If these two disputes are excluded, then the average for this data set comes down to **522 days** more than the statutory deadline.

In the **fifth data set (2015-18)**, there were **seven disputes** that were referred to compliance panels. While four panels had to be recomposed, the time it took to complete the formalities in composing the panels nearly tripled to **eighty-one days**. Out of these disputes, on an average, it took panels **259 days** more than the statutory deadline to circulate the report. It should, however, be noted that the compliance panel proceedings in all these disputes are pending completion.

Figure 5: Time Taken to Compose Compliance Panels

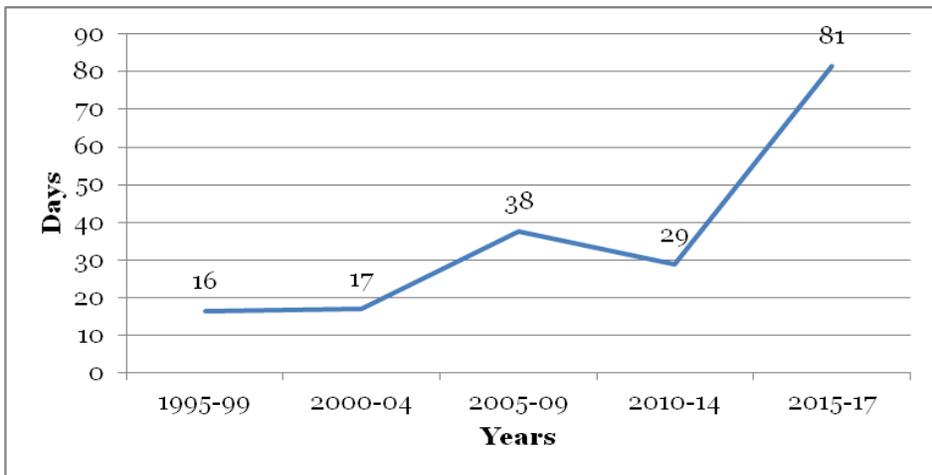
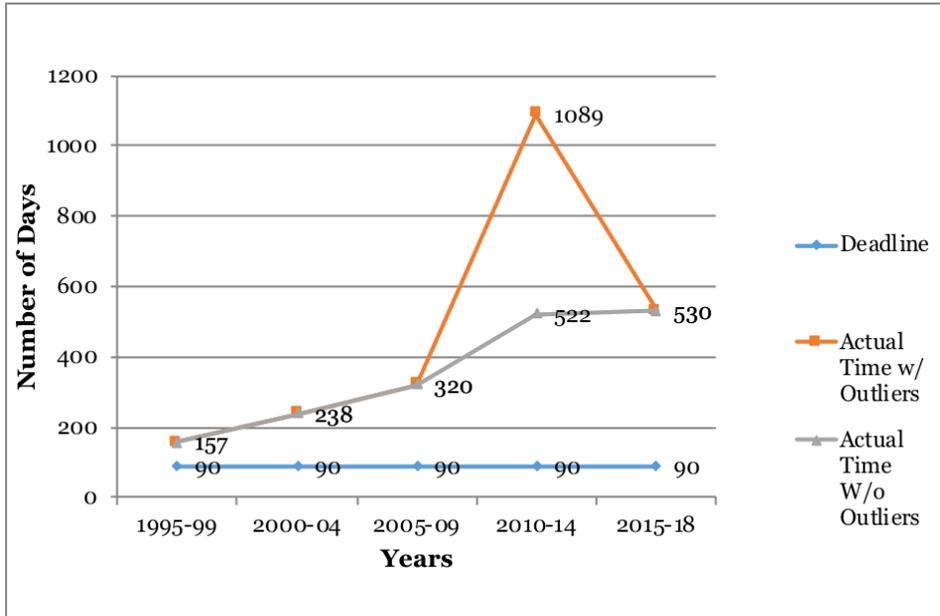


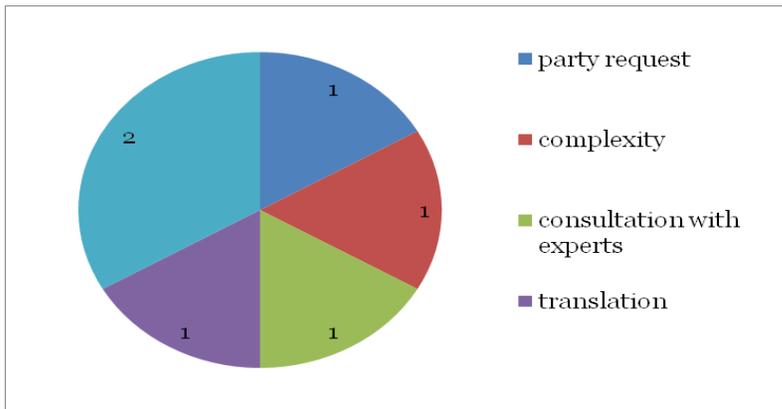
Figure 6: Time Taken to Circulate Compliance Panel Reports



3. Reasons for Delays in Circulating Compliance Panel Disputes

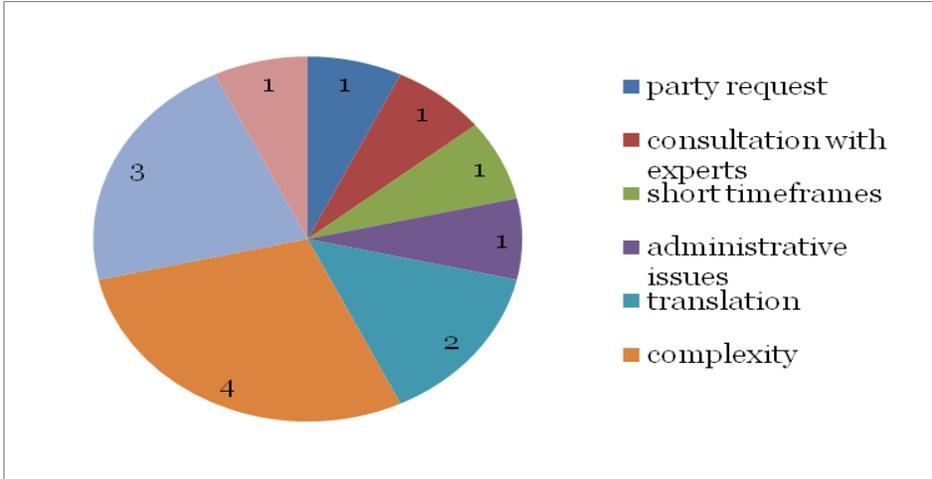
Similar to my analysis in the previous part, I have analysed reasons for delays in circulating compliance panel reports on the basis of five-year data sets.

Figure 7.1: Reasons for Delay Cited by Compliance Panels in Circulating Panel Reports (1995-99)



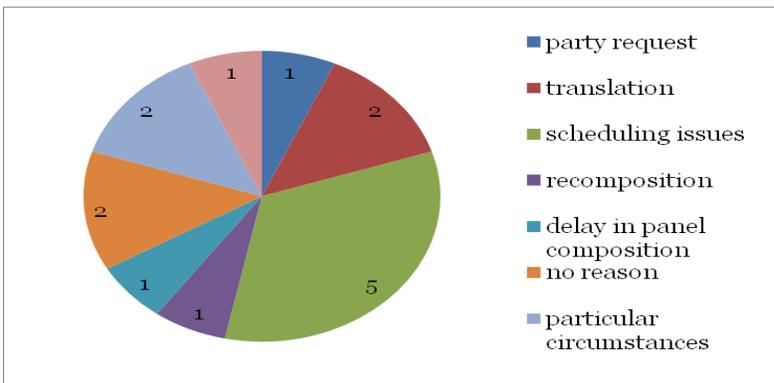
In the first five-year set (1995-99), **short timeframes** were cited in **two disputes**, while other factors such as **party request**, **complexity**, **export consultations**, and **translation** were cited in **one dispute** each.

Figure 7.2: Reasons for Delays Cited by Compliance Panels in Circulating Reports (2000-04)



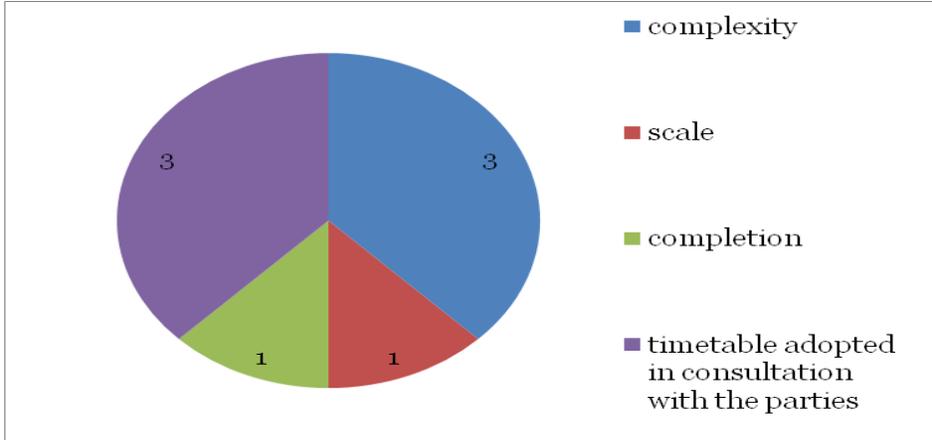
In the second five-year set (2000-04), **complexity** was cited as the biggest reason in **four disputes** with **scheduling issues** coming at a close second, being cited in **three disputes**. Other reasons such as administrative issues, party requests, re-composition, etc. were cited in **one dispute** each.

Figure 7.3: Reasons Cited for Delay in Circulating Compliance Panel Reports (2005-09)



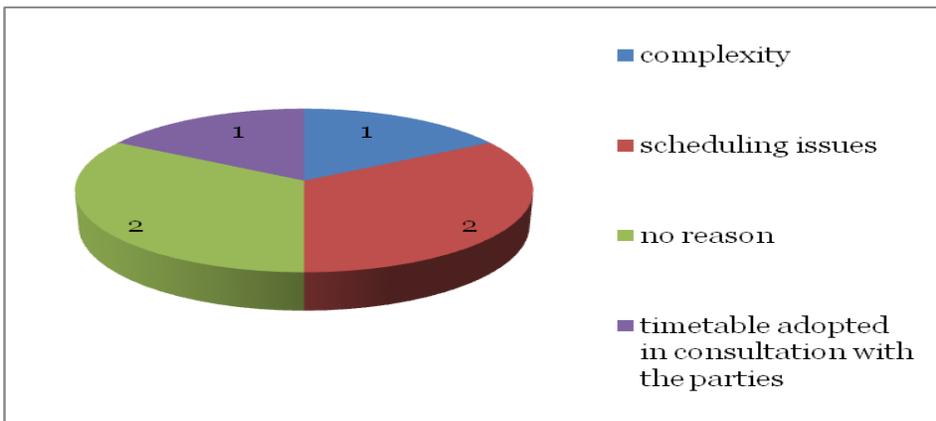
In the third five-year set (2005-09), **scheduling issues** was the most prominent reason, being cited in **five disputes**. **Translation, particular circumstances of the case, completion**, etc were cited in around **one-two disputes** each.

Figure 7.4: Reasons Cited for Delay in Circulating Compliance Panel Reports (2010-14)



In the fourth five-year set (2010-14), **complexity** and **schedule agreed on in consultation with the parties** were cited in **three disputes** each. **Scale** of the dispute and **completion** were cited in just **one dispute** each.

Figure 7.5: Reasons Cited for Delay in Circulating Compliance Panel Reports (2015-18)



In the fifth data set (2015-18), **scheduling issues** were cited in **two disputes**. **Complexity** and **schedule agreed on in consultation with the parties** were cited in **one dispute** each.

D. Appellate Proceedings

1. Timelines Under the Various Agreements

a. Timelines as per the DSU

Provisions stipulating timelines for the appellate review process are contained in Article 17 of the DSU. According to Article 17.5, an AB division is required to circulate its report within sixty days from the date on which a disputing party formally notifies its decision to appeal the panel's report. Article 17.5 further stipulates that in no case can the proceedings exceed ninety days. Similar to a panel's obligation, where the AB cannot provide its report within the sixty-day period, Article 17.5 obliges the AB to inform the DSB of the reasons for delay along with an estimate of the period within which it will submit its report. Thus, similar to panel proceedings, there are two deadlines, though they both start to run from the date on which a disputing party notifies its decision to appeal. Also, there are no separate timelines for appeals in compliance disputes.²⁹

The timelines for appeals are shorter in comparison to the timelines for panel proceedings. This has probably been done keeping in mind the limited appellate function that the AB is expected to discharge under Article 17.³⁰ Even though the clock starts ticking from the time of notification of an appeal, the AB in effect has more time to prepare for an appeal since it can informally obtain the panel's final report even prior to circulation to the Members.³¹

b. Timelines as per the ASCM

²⁹ Kennedy, *infra* note 30, and Johanneson & Mavroidis, *supra* note 11 (A different approach has been followed in papers such as these. I have not separately analysed appeals in compliance disputes. Also, the task of the AB in case of compliance disputes is essentially the same as in original disputes—adjudicating questions of law and legal interpretation on appeal).

³⁰ Mathew Kennedy, *Why are WTO Panels Taking Longer? And What Can be Done About it?*, 45(1) J. WORLD TRADE 221, 229 (2011).

³¹ *Id.*

In case of an appeal in a dispute where prohibited subsidies are involved, Article 4.9 of the ASCM requires the AB to issue its report within thirty days of notification of appeal, while proceedings cannot exceed sixty days.

In case of an appeal where actionable subsidies are involved, Article 7.7 of the ASCM stipulates that the AB must issue its report within sixty days from the date of notification of appeal. Article 7.7 also states that if the AB cannot issue its report within sixty days, it shall inform the DSB of the reasons for the delay together with an estimate of the period within which it will submit its report. Article 7.7 further establishes a second statutory deadline, viz., in no case shall the proceedings exceed ninety days from the date of notification of appeal.

2. Temporal Analysis of Appeals

In case of appeals too, there have been delays right from the first dispute that was brought before a panel: *US — Gasoline* (DS2) in 1996. However, in comparison to panel proceedings, appellate proceedings seem to have had a better track record of completion.

Out of the **twenty-six** appeals that were reviewed in the **first five-year set** of the AB's existence (**1995-99**), all but two disputes missed the first statutory deadline, and only **two** appeals missed the second statutory deadline. The average number of days it took the AB beyond the first statutory deadline to circulate the report was around **twenty-three days**, whereas in case of the second statutory deadline, the average was not a delay, rather it was ahead of the deadline by around **six days**.

The track record of the AB improved somewhat in the **next five-year set (2000-04)**. Of the **thirty-eight** appeals, while all of them missed the first statutory deadline, **six** missed the second statutory deadline by a significant margin. However, the average number of days it took beyond the first statutory deadline to circulate the report increasing noticeably to **thirty-four days**. In case of the second statutory deadline, appeals on an average were delayed by **five days**.

The track record of the AB remained the same for the **third five-year set (2005-09)**, even though there were **thirty-two appeals**, down by around 15% from the previous set. Of these appeals, all missed the first statutory deadline, while only four appeals missed the second statutory deadline. The average number of days by which these appeals missed the first and second statutory deadlines were **thirty-four days** and **four days** respectively.

The increasing pressure on the AB becomes evident from the **fourth five-year set (2010-14)**, even though only **twenty-two** appeals were filed, down by ten in comparison to the previous set. Of these appeals, all but one missed the first

statutory deadline, while only six were within the second statutory deadline. On an average, it took **sixty-seven days** more than the first statutory deadline to circulate the reports, while it took **thirty-seven days** more than the second statutory deadline. However, it must be noted that the averages in both calculations were substantially affected by the two *Aircraft* disputes between the US and the EU. Thus, excluding these two mammoth appeals, the corresponding numbers are **forty-seven days** and **seventeen days** respectively.

In the **fifth data set (2015–18)**, the AB’s track record has seen wider margins in comparison to the previous sets. Of the **nineteen disputes**, all missed the first statutory deadline, while only **one dispute** was circulated close to the second statutory deadline. The average time it has taken to circulate reports beyond the first statutory deadline is **154 days**, while it has taken **125 days** more than the second statutory deadline. Similar to the previous data set, the averages in both the calculations were substantially affected by the *Aircraft* disputes between the US and the EU. Thus, excluding these two mammoth appeals, the corresponding numbers are **104 days** and **seventy-four days** respectively.

Figure 8: Time Taken to Circulate Appellate Body Reports (First Statutory Deadline)

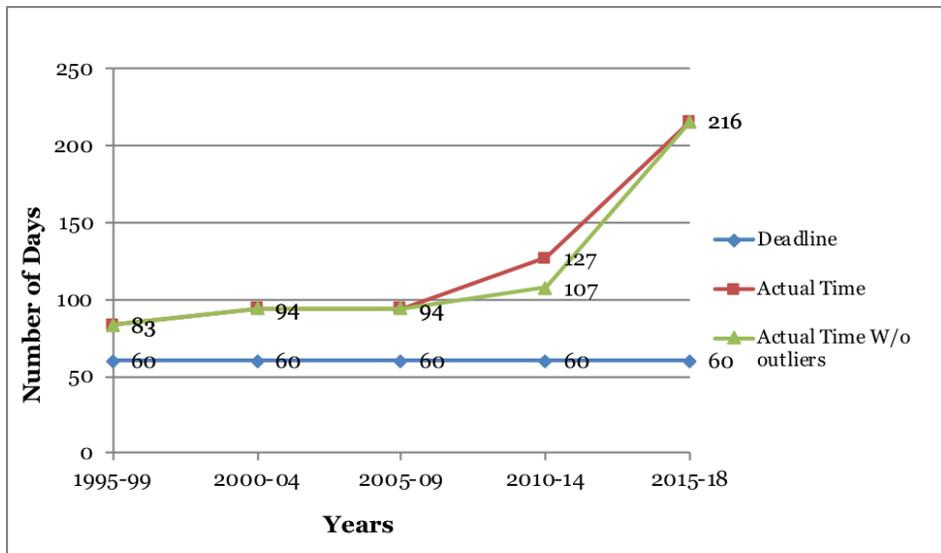
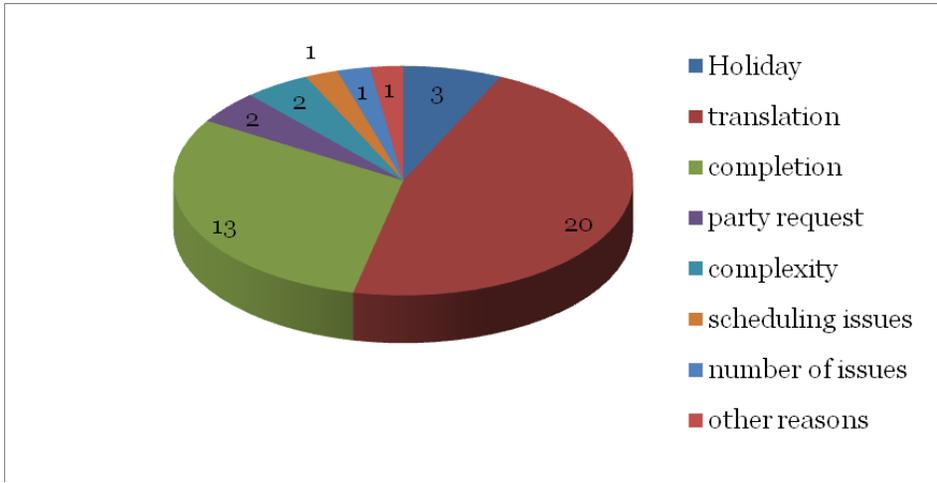


Figure 9: Time Taken to Circulate Appellate Body Reports (Second Statutory Deadline)

3. Reasons for Delays in Adjudicating Appeals

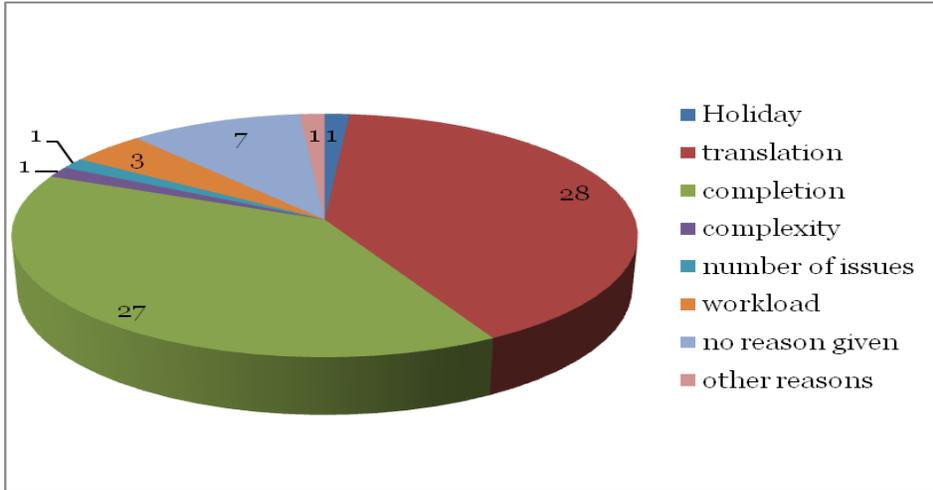
Similar to original panel and compliance panel disputes, I have analysed the reasons for delays on the basis of five-year categorisation of appellate disputes.

Figure 6.1: Reasons Cited by AB Divisions for Delay in Circulating Reports (1995-99)



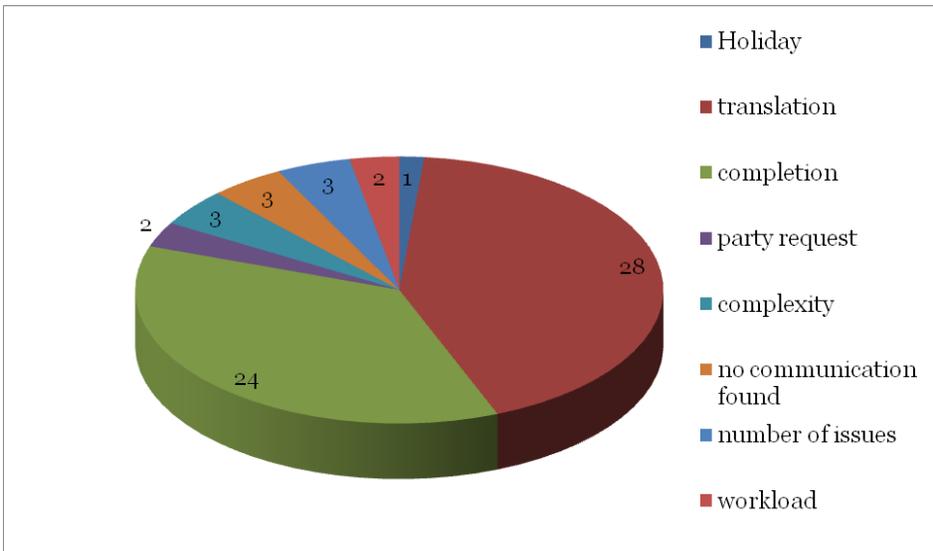
In the first five-year set (1995-99), **translation** was the most prominent reason having been cited in **twenty disputes** followed by **completion** in **thirteen disputes**. Other reasons such as **holidays**, **number of issues**, etc. were cited in **one-three disputes**.

Figure 6.2: Reasons Cited by AB Divisions for Delay in Circulating Reports (2000-04)



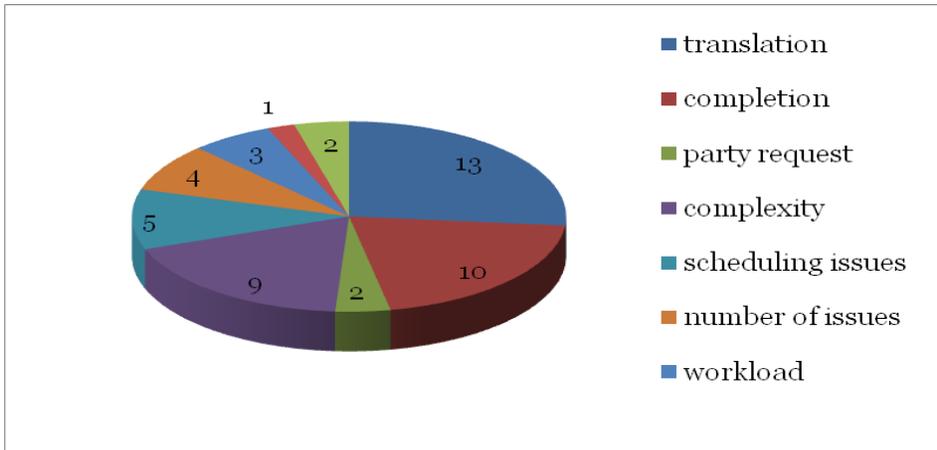
In the second five-year set (2000-04), **translation** and **completion** were the prominent reasons for delays, having been cited in **twenty-eight** and **twenty-seven disputes** respectively. Other factors such as **holiday**, **workload**, etc. were cited in **one-three disputes**. Instances where **no reason** was given were as high as **seven disputes**.

Figure 6.3: Reasons Cited by AB Divisions for Delay in Circulating Reports (2005-09)



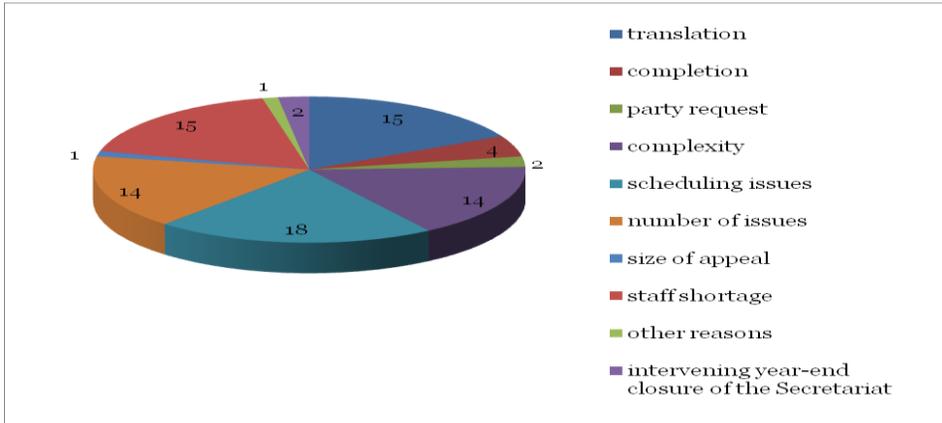
In the third five-year set (2005-09), **translation** and **completion** were again cited as the prominent reasons for delays, having been cited in **twenty-eight** and **twenty-four disputes** respectively. Other factors such as **party request**, **workload**, etc. were cited in **one-three disputes**. In this set, there were three disputes where **no communication** explaining the reasons for the delay was found.

Figure 6.4: Reasons Cited by AB Divisions for Delay in Circulating Reports (2010-14)



In the fourth five-year set (2010-14), **translation** and **completion** continued to be the leading reasons for delays, having been cited in **thirteen** and **ten disputes** respectively. Another prominent reason for delays was **complexity** in **nine disputes**. **Scheduling issues** and **number of issues** were cited in **five** and **four disputes** respectively.

Figure 6.5: Reasons Cited by AB for Delay in Circulating Reports (2015-18)



In the fifth data set (2015-18), there were five major reasons for delays in circulating AB reports. The biggest reason was **scheduling issues**, cited in **eighteen disputes**. This was followed by **translation** and **staff shortage** being cited in **fifteen disputes** each, and **complexity** and **number of issues** in **fourteen disputes** each.

E. Arbitrations to Determine Reasonable Period of Time

1. Timelines as Per the DSU

Provisions stipulating timelines for RPT proceedings are mentioned in DSU Article 21.3(c) itself which states that the reasonable period of time should be determined through arbitration within ninety days after the date of adoption of the recommendations and rulings. Footnote 12 of the DSU states that, “if the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties”.

The rule in Article 21.3(c) is rather inapt in comparison to the other time-related provisions of the DSU discussed earlier. The clock for completing proceedings to determine the RPT should ideally start from the date of constitution of the arbitration panel or from the date of request for an arbitration panel. However, oddly, the clock starts ticking from the time of adoption of the panel or the AB report. Also, unlike the other time-related provisions discussed for panel and AB proceedings, the provisions dealing with RPT arbitrations do not impose any obligations on the arbitration panel to intimate the DSB of any delay or the reasons thereof.

2. Temporal Analysis of RPT Arbitrations

In this sub-part, I have analysed **thirty-two RPT arbitrations**. Similar to compliance disputes, there have been lesser number of RPT arbitrations than original panel and appellate disputes. Since Article 21.3(c) doesn't specify a clear reference point for when the clock is supposed to stop, I have taken the ninety-day deadline to run from the date of adoption of the panel/AB report to the date of issue of award by the arbitrator. I have sorted these disputes on the basis of the date of the adoption of the relevant panel/AB report. My analysis finds that in comparison to the original and compliance panel disputes, RPT arbitrations have had a better track record, even though only two RPT awards have been issued within the statutory deadline.

In the **first five-year set (1995-99)**, out of the **six** arbitrations, **one** arbitration award was issued within the deadline. In this set, the average time it took arbitrations beyond the deadline to issue the award was **fourteen days**.

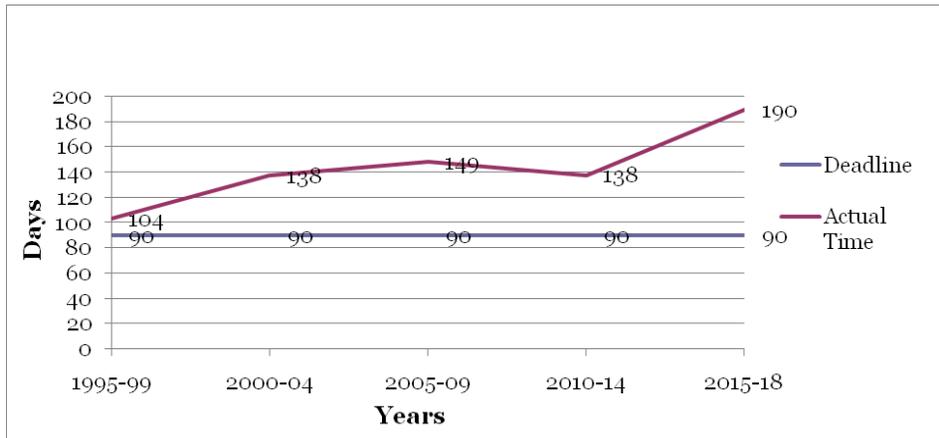
In the **second five-year set (2000-04)**, the number of RPT arbitrations doubled to **twelve**, out of which **one** arbitration award was issued within the deadline. In this set, the average time it took arbitrations beyond the deadline to issue the award more than doubled to **forty-eight days**.

In the **third five-year set (2005-09)**, the number of RPT arbitrations came down to **seven**. However, in this set, the average time it took arbitrations beyond the deadline to issue the award increased to **fifty-nine days**.

In the **fourth five-year set (2010-14)**, the number of RPT arbitrations further came down to **two**. Even though the average time it took arbitrations beyond the deadline to issue the award reduced, it was still at a considerable **forty-eight days**.

In the **fifth data set (2015-17)**, the number of RPT arbitrations increased to **five**, none of which are pending. However, in this set, the average time it took arbitrations beyond the deadline to issue the award doubled to **ninety-six days**.

Figure 11: Time Taken to Issue RPT Arbitration Awards



F. Arbitrations to Determine Levels of Retaliation

1. Timelines as Per the DSU

Provisions concerning proceedings for determination of the reasonable level of suspension of concessions or other obligations (retaliation) are contained in Article 22 of the DSU. According to paragraph 6 of Article 22, if the respondent WTO Member objects to the level of retaliation proposed by the complaining WTO Member, then the matter has to be referred to arbitration, to be carried out by the original panel members (if they are available), or by an arbitrator appointed by the Director-General.

Paragraph 6 further states that the arbitration proceedings are to be completed within sixty days after the date of expiry of the RPT for the respondent to comply with the findings adopted by the DSB. Similar to the provision for RPT arbitrations, the rule in Article 22.6 is rather under-developed in comparison to the other time-related provisions of the DSU.

The clock for completing proceedings to determine the RPT should ideally start from the date of constitution of the arbitration panel or from the date of request for an arbitration panel. However, oddly, the clock starts ticking from the date of expiry of the RPT. This means that the time limit for completion of Article 22.6 proceedings begins even before the respondent has provided a compliance/implementation status report to the DSB.

Further, the DSU presumes initiation of retaliation proceedings irrespective of a determination of compliance by a panel. However, the practice in a number of cases is that the complainant reserves its right to request authorisation to retaliate

till completion of compliance proceedings.³² This is probably an anomaly that can be clubbed along with the 'sequencing issue' that has resulted due to a drafting inconsistency in the legal text of the DSU. Also, unlike the other time-related provisions discussed for panel and AB proceedings, Article 22.6 does not impose any obligation on the arbitration panel to intimate the DSB of any delay or the reasons thereof.

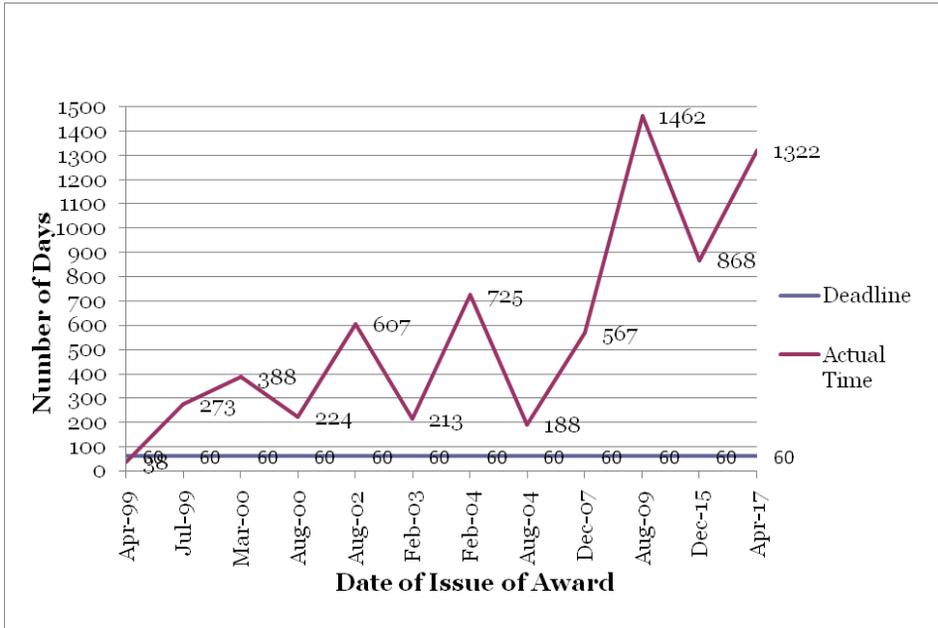
2. Temporal Analysis of Retaliation Arbitrations

From 1995 till date, the number of disputes that have been referred to arbitration under Article 22.6 of the DSU is **thirteen**. This number dwarfs in comparison to the number of disputes in the original panel and compliance panel appellate disputes that have been adjudicated. Due to the smaller number of retaliation arbitrations, no segmented analysis of these disputes has been conducted. Rather, a single aggregate analysis has been done.

Further, due to the anomaly discussed earlier (from when the timeline commences), it would not be possible to appropriately calculate the delays. To illustrate, for instance, in *US — Tuna*, the date the RPT expired was July 13, 2013, which means that retaliation arbitration should have been completed by September 11, 2013. However, the appeal in the compliance proceedings was completed only in November 2015, meaning that there was a delay of around thirteen hundred days for completion of the arbitration proceedings, whereas the DSB referred the matter to arbitration only on March 23, 2016. A more appropriate standard of timeline for retaliation arbitrations would have been sixty or ninety days *from the date of reference to arbitration by the DSB*.

Figure 12: Time Taken to issue Retaliation Arbitration Awards

³² This is also a result of sequencing agreements entered into between the disputing parties. Some of these disputes where parties have entered in sequencing agreements are *Brazil — Retreaded Tyres*; *EC — Biotech*, *EU — Biodiesel*.



IV. SYSTEMIC ISSUES ARISING FROM DELAYS IN THE WTO DISPUTE SETTLEMENT MECHANISM

A. Importance of Prompt Settlement of WTO Disputes

One of the guiding principles of dispute settlement spelt out under the DSU is the emphasis on ‘prompt settlement of disputes’. The importance of this principle has been recognised in Article 3.3 of the DSU which states that, “the prompt settlement of situations, in which benefits accruing to a Member are being impaired by measures taken by another Member, is essential to the effective functioning of the WTO, and also to the maintenance of a proper balance between the rights and obligations of Members”.

The importance of this principle was recognised way back in the GATT era itself as discussed in an earlier part. AB Member, Ujal Singh Bhatia, has described the inclusion of the requirement of prompt settlement of disputes at the WTO as a major feature distinguishing it from other international dispute settlement systems.³³ Bhatia adds that the “special emphasis on promptitude was based on the common understanding that, in the world of commerce, *time really is money*”

³³ BHATIA, *supra* note 2, at 2.

(emphasis added).³⁴ Article 3.2 of the DSU complements the principle of 'prompt settlement' by recognizing the DSM as a central element in providing security and predictability to the multilateral trading system. It was probably in the context of these principles that Uruguay Round negotiators inscribed timelines in the DSU that were expected to be followed religiously by Members, the tribunals and also the Secretariat.

When the DSU was drafted, negotiators probably expected that the panels and the AB would be faced with delays and hence inserted provisions to inform the DSB in its capacity as the body overseeing disputes at the WTO. However, negotiators probably expected that this notification obligation would seldom kick in; they might not have expected this to become a recurrent phenomenon as is currently being witnessed in the DSM. This is also probably *one* of the reasons why negotiators may not have considered the need for retrospective or provisional remedies at the DSM, expecting that the entire dispute settlement process would in all probability be completed within the timelines prescribed under the DSU.

Long delays do not bode well for the systemic certainty, security, and predictability of the WTO, which the DSM is expected to contribute to. The absence of prompt settlement of disputes also undermines the effectiveness and credibility of the DSM.³⁵ This point has been elucidated well by AB Member Bhatia in his speech at a special event held to mark the release of the AB's 2016 Annual Report. According to Bhatia:³⁶

"When delays in WTO dispute resolution become the norm, they cast doubt on the value of the WTO's rules-oriented system itself. An erosion of trust in this system can lead to the re-emergence of power orientation in international trade policy. Delays compel WTO Members to look for other solutions, potentially elsewhere. And in this, it is the weaker countries that stand to lose the most."

Bhatia has very validly pointed out the implications of delays in the DSM for developing countries. In the absence of an adjudicating system of settling disputes, Members may end up deploying their diplomatic assets for negotiating a mutually acceptable settlement with their disputing counterparts. The implication of such practice is that dispute settlement would revert to the power-oriented system which prevailed during the GATT era as against the rule-oriented system which is

³⁴ *Id.* at 3.

³⁵ WTO Dispute Settlement Body, *Minutes of Meeting (Held on 31 August 2015)*, WTO Doc. WT/DSB/M/367, at 24 (Oct. 30, 2015) [hereinafter *Minutes of Meeting – 31 August 2015*].

³⁶ BHATIA, *supra* note 2, at 5.

envisaged under the DSU. If this were to happen, the consequences, particularly for weak developing countries, could be severe.

One Member, Guatemala, cautioned that, in the absence of effective action to address the situation, the principle of ‘prompt settlement of disputes’ would risk becoming a ‘best endeavour’ provision, an illusionary aspiration.³⁷ Indeed, while a certain level of deviation from the statutory deadlines is acceptable, this level should not be such that it changes the meaning of DSU Article 12.9 far from it.³⁸

Another implication of delayed resolution of disputes is the minimisation of reputational costs.³⁹ It has been postulated that one of the reasons that compels States to comply with international law is to avoid reputational costs. The same postulate is contended to be true in the WTO framework. However, in a scenario where resolution of disputes is delayed, a Member whose measure has not been held to be in violation of the WTO, howsoever apparent, would incur minimum reputational costs till the findings of violation against it.

B. Economic Implications of Delayed Dispute Settlement

The brunt of delays in dispute adjudication is being faced by all WTO Members irrespective of their development status. Some Members have taken to the floor at the DSB to express their unhappiness over the inordinate delays. At a regular meeting of the DSB on May 29, 2015, Canada expressed its dissatisfaction at the long delays that had affected the *US — COOL* dispute.⁴⁰ Pointing out that the dispute had taken five and a half years to get to the retaliation stage, Canada stated that it had faced delays at almost every stage of the dispute settlement process. Highlighting the impact of these delays on the Canadian economy, and also the systemic implications of the delays on the DSM, Canada stated:

“1.3 ... While there were a variety of reasons for the various delays, many were the result of the workload challenges facing the WTO dispute settlement system that Members had been trying to address over the last few years. These delays had resulted in a significant burden on the Canadian economy, and in particular on the Canadian stakeholders affected by the measure at issue, as they had allowed the United States to maintain its WTO-inconsistent measure for far longer than originally foreseen in the

³⁷ Minutes of Meeting – 31 August 2015, *supra* note 35, at 23-24.

³⁸ *Id.*

³⁹ Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80(1) GEO. WASH. L.R. 102, 139 (2011).

⁴⁰ WTO Dispute Settlement Body, *Minutes of Meeting (Held on 29 May 2015)*, WTO Doc. WT/DSB/M/362, at 2 (July 14, 2015) [hereinafter Minutes of Meeting – 29 May 2015].

DSU. The outcome of this dispute, therefore, served as a reminder of the importance of Members ongoing efforts, formally in the DSB and in the Budget Committee, and informally among Members, to address the workload challenges. The continued credibility and legitimacy of the system depended on its capacity to live up to the original promise of prompt settlement of disputes.”

The economic costs of delayed dispute resolution at the WTO were also highlighted by Korea which expressed its anguish at the DSB on August 31, 2015.⁴¹ At the meeting, Korea stated:

“13.3. However, WTO disputes were not about abstract disagreements. Real world economic interests underlay every single dispute. There were people who suffered real losses while a dispute was pending. The DS488 dispute illustrated this vividly. The dispute involved anti-dumping measures applied by the United States against imports of certain Korean steel products. As a result of these punitive measures, the affected Korean companies were sustaining losses of US\$10 million a month. A delay of fifteen months meant losses of US\$150 million. These were just the losses from the delay in getting the panel proceedings operational. By the time the panel report was actually received, the damage would likely be double that figure. These companies could very well have gone out of business by then and thousands of people could have lost their jobs. At that point, any ruling, however favourable, would have become an afterthought.”

The delay in obtaining a verdict on the consistency of a domestic measure can especially be damaging in case of measures such as anti-dumping duties,⁴² import restrictions, etc., which have a more direct, immediate, and substantial impact on traders. This is so because once hard-won access to a particular market has been affected, it becomes too expensive for exporters to wait for restoration of market access. Exporters are then forced to explore other markets for their products.

Highlighting the systemic implications of delays in the DSM, Korea further stated:

“13.4. The problem would only get worse if left unaddressed. Long delays created perverse incentives by lowering the cost of adopting and maintaining WTO-inconsistent measures. Interest groups seeking protection would pressure Members to adopt those measures, insisting, rightly, that they would not be subject to review by the WTO for years. Members could therefore expect more protectionist measures and more, not less, disputes being brought to the WTO. These, in turn, would cause further delays,

⁴¹ Minutes of Meeting – 31 August 2015, *supra* note 35.

⁴² Giorgio Sacerdoti, *The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges*, 6 (Bocconi Legal Stud., Research Paper No. 2809122, 2016), <https://ssrn.com/abstract=2809122>.

prompting a vicious, never-ending cycle. It was in the interest of everyone, the parties, the wider Membership and the Secretariat, not to let this happen.”

Also, as pointed out by Mexico at the same meeting of the DSB, delays not only increase the incentives to adopt protectionist measures, but also discourage the initiation of disputes by Members.⁴³ This would contribute to trade-related economic disruptions that are undesirable.

C. Encouraging Unilateralism

Another implication of bottlenecks in the DSM is that it raises the spectre of unilateralism in the settlement of trade disputes, which, incidentally, the DSM was intended to prevent. The implication of a clogged DSM is that Members could use the delays plaguing the system as an excuse or a motivation for taking unilateral actions targeting purported violations—which is prohibited by Article 23 of the DSU—instead of taking due recourse to the DSU. This aspect has actually been noted by the panel in *US — Section 301*. In its analysis of the provisions of Section 304 of the Trade Act, 1974, which obliges the United States Trade Representative to make certain unilateral determinations, the panel made the following observations:⁴⁴

“Second, as a matter of law, since most of the time-limits in the DSU are either minimum time-limits without ceilings or maximum time-limits that are, nonetheless, indicative only, DSU proceedings – from the request for consultations to the adoption of findings by the DSB – may take longer than 18 months and have in practice often led to time-frames beyond 18 months. As a result, the USTR could be obligated in certain cases brought by the US – and indeed in certain cases has already been so obligated – to make a unilateral determination as to whether US rights are being denied before the completion of multilateral DSU proceedings.”

At present, it may not be entirely the case that WTO Members are relying on the delays in the WTO adjudication process to maintain trade violations for as long as possible.⁴⁵ However, the knowledge that Members gain through their experience with the DSM could be strategically used and acted upon by them particularly when it comes to negotiating mutual settlements.⁴⁶

⁴³ Minutes of Meeting – 31 August 2015, *supra* note 35, at 25.

⁴⁴ Panel Report, *United States — Sections 301–310 of the Trade Act 1974*, ¶ 7.31(b), WTO Doc. WT/DS/152/R (adopted Jan. 25, 2000).

⁴⁵ Brewster, *supra* note 39, at 58.

⁴⁶ *Id.*

V. PANEL AND APPELLATE BODY PROCEEDINGS: REASONS FOR DELAYS AND ISSUES FACED

In this Part, I discuss the factors that impact the ability of the panels/the AB to issue/circulate their reports within the stipulated deadlines. Most of the reasons that I have discussed in this Part have been gleaned from the statutory communications issued by the panels and the AB. I have not discussed *all* reasons for delays cited, but only those which are significant and have been repeatedly cited.

A. Scheduling Issues of Panelists and AB Members

One of the prominent reasons cited by the panels as well as the AB for delays is scheduling issues, particularly in disputes of the recent past. Scheduling issues can primarily be attributed to the current structure of the panels and the AB.

With regard to the AB, scheduling issues arise due to a combination of the following factors: a heavy workload, unfilled vacancies on the AB, a number of parallel appellate proceedings, and an overlap in composition of divisions hearing the different appeals. When the DSU was being negotiated, drafters did not contemplate the high number of appeals as is presently the case,⁴⁷ leave alone a high number of complaints being filed at the original stage. However, the current reality is that almost every panel report is inevitably appealed. This can be explained by the common wisdom that Members prefer to appeal disputes, even those which are seemingly obvious and simple as far as the legal aspects are concerned. Many reasons such as the need to give the perception to domestic constituents back home of being tough at the WTO, buying time before implementation, or even a glimmer of hope that one of the many findings would be reversed, compel the losing party to appeal. Since the AB has a fixed number of members, and there is a limit on the number of divisions which AB members can be part of simultaneously, this can lead to serious scheduling issues if there is a high rate of appeals.

Conflicting dispute schedules also arise in case of panel proceedings. For instance, panelists may be required to serve on two compliance panels⁴⁸ simultaneously or

⁴⁷ Debra Steger, *The Founding of the Appellate Body*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM*, 447 (Gabriel Marceau ed., 2015).

⁴⁸ Communication from the Panel, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear: Recourse to Article 21.5 of the DSU by Panama*, WTO Doc. WT/DS461/27 (Sept. 27, 2017).

serve in RPT arbitration and a compliance panel simultaneously.⁴⁹ Even though the schedule of the panel proceedings is fixed keeping in mind the schedule of the panelists, for practical reasons, it is possible that there will be a conflict between these schedules.

Also, a problem common to both the panels and the AB is that due to their status being either *ad hoc* (in case of panels) or part-time (in case of the AB), they are most often engaged in other professional commitments. These professional commitments may further constrain their ability to devote time to a particular dispute.

This systemic issue also highlights a common challenge in the legal profession: seldom are their members in control of their schedule!

B. Increased Complexity of Disputes

One of the biggest reasons cited by the panels and the AB that affects the timely completion of their proceedings is *complexity*. The notion of complexity, as cited by the panels and the AB, has many dimensions such as legal complexity, technical complexity, scientific complexity, procedural complexity, and substantive complexity.

Henrik Horn, in an incisive paper on the time WTO panels take to issue reports, discusses factors such as complexity which delays the panel proceedings. Horn identifies complexity as stemming from three separate sources: a *vague and untested legal regime* in the WTO; difficulties in understanding the *scientific or technical* issues involved; and from *political intricacies*, where the panel is seeking to understand the regulatory preferences of the parties, and WTO Members more generally.⁵⁰ With regard to legal complexity, he adds that disputes have become more complex since Members are enacting protectionist ‘behind the border’ measures in the form of complex domestic regulatory policy measures.⁵¹ Horn further states that where such measures are not transparent, the panel’s task becomes even more difficult.⁵²

⁴⁹ Communication from the Panel, *United States — Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products: Second Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc. WT/DS381/41 (Nov. 21, 2016).

⁵⁰ Henrik Horn, *The Time WTO Panels Require to Issue Reports*, 2 (Res. Institute Indus. Econ., IFN Working Paper No. 979, 2013), www.ifn.se/wfiles/wp/wp979.pdf.

⁵¹ *Id.*

⁵² *Id.*

From a qualitative perspective, the legal and factual claims and issues being presented by parties before the panels and the AB have become more complex in nature in comparison to the disputes in the initial years of the DSM. The arguments being presented by the parties are also becoming increasingly sophisticated.⁵³ This is clearly a reflection of the increasingly legalised nature of disputes at the WTO, with more lawyers and law firms getting involved in the dispute settlement process on behalf of the participating countries. The implication for adjudicators is that they have to spend more time in analysing the submissions of the parties, thereby extending the length of the proceedings.

Increasing complexity of disputes in general has also been contributed to by growing jurisprudence.⁵⁴ Even though panels are not as such bound by previous case law, the highly legalised nature of disputes, heavy reliance by the parties on previous decisions in their submissions, advice from the Secretariat, and pressure (or the threat of censure) from the AB, all make the panels consider the extensive jurisprudence relevant to the dispute at hand. Even though the existence of previous jurisprudence should, in theory, make the panel's job easier,⁵⁵ this may not be the case since panels cannot be expected to adopt a mechanical approach and would still have to analyse the same. Complexity of disputes on account of jurisprudence can be caused even towards the latter stages of the dispute.⁵⁶ This happens when the panel or the AB also decides to factor the findings of another related dispute which has been pronounced close to the completion of proceedings of its current dispute.

Scientific and technical complexities arise in disputes involving the Agreement on Technical Barriers to Trade (TBT Agreement) and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Further, procedural aspects of consulting with experts and the attendant factual complexity end up consuming more time in these disputes.

C. Increased Scale and Volume of Submissions and Evidence

Apart from the qualitative aspects, there has been a quantitative increase in the legal and factual claims being presented before the panels and the AB. The submissions being made before the panels and the AB are becoming more voluminous and cover numerous claims.

⁵³ Sacerdoti, *supra* note 42, at 2.

⁵⁴ *Id.* at 16.

⁵⁵ *Id.*

⁵⁶ Kennedy, *supra* note 30.

One of the first disputes which got notoriously delayed on account of the volume of material before the panel was *EC — Biotech*. In fact, when the panel circulated its report, the Chairman's cover letter specifically pointed out the impact of the claims on the panel's timelines. According to the note from the Chairman:⁵⁷

"1. With the circulation of its Reports, the Panel is completing more than two and a half years of legal proceedings. This is an unusually long period of time for WTO panel proceedings, considering also that Article 3.3 of the DSU stresses the importance of the prompt settlement of disputes. But the number of claims and products involved in this case was unprecedented and the record before the Panel immense. An estimated 7-8 work years of professional Secretariat staff time (not including translation and support staff time) have gone into the preparation of these Reports, not counting the time invested by the Panellists. This quite simply means that panels are unable to complete proceedings concerning such disputes within the 6-9-month timeframe laid down in Article 12.9 of the DSU, without additional resources being made available to the Secretariat for this purpose."

Also, the panels and the AB are being presented with more evidence, which is in the form of exhibits. For instance, in the first five years of dispute settlement, the number of exhibits was an average of ninety-four per dispute.⁵⁸ However, this number has increased to a whopping three hundred for the period from 2009-14 even after excluding the humungous *Aircraft* disputes.⁵⁹ Similarly, the number of pages of interim review and findings in the panel reports has increased from an average of fifty pages per dispute during 1996 to 2000 to a whopping 183 pages.⁶⁰ Since the DSU lacks any page limits in party submissions, parties do not feel constrained in filing lengthy submissions accompanied by extensive exhibits.⁶¹ This means that panels have to deal with an increasing quantum of technical evidence.

The panels and the AB, on their part, cannot be expected to hasten their consideration of the disputes before them. They would have to carefully and

⁵⁷ Communication from the Chairman of the Panel, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS293/26 (Sept. 29, 2006).

⁵⁸ *Azevedo Says Success of WTO Dispute Settlement Brings Urgent Challenges*, WORLD TRADE ORG. (Sept. 26, 2014), https://www.wto.org/english/news_e/spra_e/spra32_e.htm [hereinafter *Urgent Challenges — News Item*].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Scott Lincicome & Davida L. Connon, *WTO Dispute Settlement—Long Delays Hit the System* (June 2014), <http://www.whitecase.com/sites/whitecase/files/files/download/publications/wto-dispute-settlement-long-delays-hit-the-system.pdf>.

patiently go through the submissions and the material presented to them. Doing otherwise would be unfair to participants who would have carefully prepared written and oral submissions on complex issues.⁶²

D. Increased Number of Participants

As discussed in Part II, the current timelines prescribed in the DSU were based on GATT dispute settlement practice which was gradually codified into the various instruments. These timelines became the obvious reference point for Uruguay Round negotiators when prescribing the timelines under the DSU. However, it is important to note that when these timelines were being discussed, the number of Contracting Parties and also those participating in the GATT DSM were far less than the current number of Members and those participating in the WTO DSM since the formation of the WTO. At the time of entry into force of the Marrakesh Agreement, the WTO consisted of 128 Members. Twenty-two years later, the WTO today has 164 Members. Some of the notable additions to the Membership include countries such as Russia and China, the latter of which is a frequent participant in the DSM. Thus, the timelines in the DSU are clearly out of sync with the size of the Membership and will need to be revised to factor in the increase in Membership.

The increase in Membership has also resulted in an increase in third party participation in disputes. From 1995 onwards, there has been increased participation of WTO Members as third parties in disputes. This also reflects the increase in capacity of developing country participants and the systemic importance of a number of disputes for a large part of the Membership. A notable example is the landmark *Australia — Plain Packaging* dispute which, at the panel stage, had a record participation of thirty-four Members as third parties!⁶³ While these numbers are indeed heartening and reflective of the high interest shown by Members in participating as third parties in disputes, this also means that there is going to be much more work for the panelists, the AB, and the Secretariats, in terms of the number of written submissions that have to be reviewed and the time that has to be granted for each of the third parties to present their views orally.

⁶² Communication from the Appellate Body, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/7 (Apr. 19, 1996).

⁶³ For details about the third parties, please visit the weblink to the dispute at DS467: *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Key Facts, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm (last visited Nov. 15, 2018).

E. Timetable Adopted in Consultation with the Parties

In WTO dispute settlement, it is usually the practice for a panel, before beginning with its work, to draw up a timetable in accordance with the format provided for in Annex 3 of the DSU. As per Article 12.3 of the DSU, the panel is expected to draw up its timetable, as soon as practicable and whenever possible, within seven days of its composition and after consulting the disputing parties. In drawing the timetable, panelists usually refer to paragraph 12 of Appendix 3 to the DSU (Working Procedures for Panel Proceedings) which establishes a model timetable for panel work covering timelines for filing submissions, rebuttals, issuance of interim report, receipt of comments, etc. The timelines for these stages are set in terms of weeks, with a number of stages having a minimum and maximum range.

Though the schedule drawn up by the panel should ideally not exceed the timelines under Article 12.8 of the DSU, dispute settlement practice has been different. In most cases, the schedule or the timetable adopted in consultation with the parties extends beyond that provided for in Article 12. When the maximum timeframes allowed in each of the steps in the panel's timetable based on Appendix 3 of the DSU, (from composition to issuance of the final report) are resorted to, this adds five more weeks to the twenty-six-week time frame (i.e., the six-month timeframe).⁶⁴

It is important to note here that these delays are not a result of factors such as complexity, volume/scale of submissions, scheduling issues, etc. Rather, the delays are a result of the deference accorded to parties who wish to use the maximum available timelines under paragraph 12. Thus, there is no delay that can be attributed to the panel or its functioning as such, but to an extension of the panel process beyond the stipulated timelines, in accordance with the preferences of the parties.

F. Party Requests

Very often, the reasons for delays have been attributed to difficulties that arise in the adjudication process, such as complexity, scheduling issues, translation, etc. However, there have been a number of instances where the panels or the AB have delayed the adjudication process on account of the requests by the disputing parties themselves. Besides the delays on account of party requests for preliminary rulings, or suspension of proceedings under Article 12.12 of the DSU, some of these delays are on account of requests by the parties for more time to file their

⁶⁴ Kennedy, *supra* note 30, at 230-31.

written submissions,⁶⁵ or rebuttals,⁶⁶ or to reschedule the dates of oral hearing,⁶⁷ on account of their own scheduling issues.⁶⁸

In some instances, parties have requested the panels to delay the proceedings till the DSB adopts the decisions of a related dispute.⁶⁹ In some other instances, parties have requested panels to adjust the schedule of the panel process to harmonise it with another related dispute.⁷⁰ In one particular instance, the AB had to extend the appellate process on account of the parties' priorities for the Singapore Ministerial Conference.⁷¹

G. Preliminary Rulings

In disputes of recent years, it has become a common practice for the disputing parties to request the panel or the AB to issue a preliminary ruling. Preliminary rulings are decisions regarding a procedural or substantive issue that are expected to be resolved by the panel or the AB prior to adjudicating the disputes' merits as such. What is unique about preliminary rulings is that neither the DSU nor any other legal WTO instrument mentions such a procedural mechanism. Yet, these preliminary rulings have become a mainstay of WTO disputes.⁷² In fact, in almost every dispute in the recent years, it has become the norm for panels to issue preliminary rulings on important legal issues pursuant to requests by parties.

While this procedural mechanism is welcomed (in spite of the absence of any provision for preliminary rulings in the DSU), what is to be noted is that they have

⁶⁵ Communication from the Chairman of the Panel, *India — Measures Affecting the Automotive Sector*, WTO Doc. WT/DS146/6, WT/DS175/6 (Aug. 21, 2001).

⁶⁶ Communication from the Chairman of the Panel, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/Ds291/26, WT/Ds292/20, WT/Ds293/20 (Aug. 20, 2004).

⁶⁷ Communication from the Appellate Body, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/10, WT/DS401/11 (Mar. 26, 2014).

⁶⁸ Communication from the Chairman of the Panel, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WTO Doc. WT/DS207/4 (Nov. 28, 2001).

⁶⁹ Communication from the Chairman of the Panel, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS79/4 (June 24, 1998).

⁷⁰ Communication from the Chairman of the Panel, *European Communities — Trade Description of Scallops*, WTO Doc. WT/DS7/9 (Feb. 9, 1996).

⁷¹ Communication from the Appellate Body, *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Doc. WT/DS24/6 (Jan. 9, 1997).

⁷² Jayant Raghu Ram, *Pitching Outside the DSU: Preliminary Rulings in WTO Dispute Settlement*, 50(3) J. WORLD TRADE 369, 375 (2016).

been cited by certain tribunals as *a* reason for delay in completing proceedings. One former AB Member has termed preliminary rulings as a typical lawyers' trick, pointing out how much the DSM has become judicialised.⁷³

However, preliminary rulings should not be considered as an extraneous factor that is causing delays. Instead, the preliminary ruling mechanism should be considered an integral part of the adjudication process. It should also be considered as necessary in the grander scheme of dispute settlement as it provides more certainty and can even save time in the long run.⁷⁴ Members should consider revising the DSU to provide for preliminary rulings and adjust the timelines accordingly.

H. Excessive Appealing of Disputes

Since the DSU lacks any quantitative limitations on party claims, submissions, and arguments, parties are tempted to present an exhaustive set of written submissions. This can be a problem at the appellate stage. Since every disputing party is entitled, as a matter of right under the DSU, to appeal the panel findings, disputing parties use this as an opportunity to air their grievances *en masse* before the AB without any filter. There is thus the problem of excessive appealing of the already excessive claims that were submitted before the panel.

This problem was highlighted at a regular meeting of the DSB held on December 19, 2014 when the DSB was, *inter alia*, considering the AB report in *US — Carbon Steel (India)* for adoption. At this meeting, the United States commented on the high number of claims and subsequent points of appeal brought by India. While appreciating the efforts put in by the panel, the AB, and the Secretariat, the United States stated: "*The task that they performed here was particularly difficult in light of the number of claims India brought before the Panel and the number of issues it appealed.*"⁷⁵ Commenting on the points of appeal raised by India before the AB, the United States further stated:⁷⁶

⁷³ Sacerdoti, *supra* note 42, at 7.

⁷⁴ For instance, if a panel decides in its preliminary ruling that a particular measure or claim is not within the terms of reference, the adjudication of such measure or claim can be avoided in the further course of proceedings. Thus, even though the panel may take time to adjudicate a preliminary request, it saves time in the long run for the aforesaid reason.

⁷⁵ United States Trade Representative, Geneva, *Statement by the United States at the Meeting of the WTO Dispute Settlement Body* (Dec. 19, 2014), https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec19.DSB_Stmt_.as-delivered.Public.pdf.

⁷⁶ *Id.*

- *“India’s panel request contained hundreds of claims under 25 separate WTO provisions. The overwhelming majority of India’s claims were rejected as baseless. Unfortunately, India then essentially appealed the Panel’s findings in their entirety. This attempt to redo the panel proceedings led to over 90 claims on appeal, including 24 different claims under DSU Article 11.*
- *While a party of course has the right to appeal a panel report it considers erroneous, India’s approach to the appeal is difficult to reconcile with the WTO dispute settlement system as designed by Members. In particular, a WTO appeal is not a chance for a Member to re-air its grievances wholesale in front of a new audience in the hopes of receiving a different outcome, but instead is an opportunity to correct legal interpretations and legal conclusions that are relevant to securing a positive solution to the dispute. Undisciplined appeals serve to exacerbate the workload problems facing the system as a whole. We hope other Members will show greater restraint in future appeals.”*

While India’s legal team was certainly entitled to put up a zealous defence, especially given the high stakes involved, and a difficult respondent, some commentators have expressed the view that perhaps the AB division hearing the appeal would have liked to be less burdened by the number of points of appeal brought by India.

I. Need for Scientific and Technical Expertise

One of the major reasons cited by panels as for delay is the need to consult with experts, primarily scientific and technical experts, under the provisions of Article 11 of the SPS Agreement and Article 13 of the DSU. In case of SPS disputes, consultation with experts can entail some additional time as, under Article 11.2 of the SPS Agreement, the panel has to consult with the parties before appointing the experts. Further, scientific and technical expertise may entail additional time since the use of experts may involve administrative tasks (such as logistics, coordination, etc.) that will have to be facilitated by the WTO Secretariat.⁷⁷

J. Shortage of Secretariat Staff

Unlike other international systems of settling disputes, the WTO’s DSM is unique in that the Secretariats play an important role in assisting tribunals in the discharge of their adjudicatory functions. However, the surge in the number of disputes being initiated at the WTO and the difficulties in staff retention due to various reasons has led to a shortage of staff available to assist the panels and the AB. This is particularly the case with the Rules Division since it is concerned with the

⁷⁷ Horn, *supra* note 50, at 14.

administration of trade remedy disputes, which constitute the bulk of disputes litigated at the WTO. As a result, the increasing workloads of the Secretariats can and does impact the tribunal's ability to finalize reports in time.⁷⁸

Another point to be noted is that while the size of the Secretariat workforce is constant, there is no limit on the number of panels that can be operational at a single point of time since panels are not permanent and are established *ad hoc*. The implication is that there can be multiple panels that are active at any given point of time, which have to be assisted by the Secretariat. The consequence of this is that if all the Secretariat staff are tied up in a certain number of disputes, then subsequent panels may not be able begin their work. Such a situation actually came head on that when the initiation of panel proceedings at one point of time had to be deferred due to the unavailability of Secretariat staff to assist them. The first such case where this happened was *United States — Oil Country Tubular Goods*, a complaint initiated by Korea. The panel was established on March 25, 2015, and composed on July 13, 2015. Thereafter, the panel proceedings should have commenced immediately. However, much to Korea's chagrin, the Secretariat informed Korea that owing to the unavailability of secretariat staff to assist the panel, proceedings would not even *commence* until the end of 2016.⁷⁹

A simple solution of increasing the workforce is exactly what the WTO has done. In this regard, the DSM has rightly been compared to an ocean liner, which unlike a sailboat, requires more resources, more fuel, and a bigger crew.⁸⁰ However, various factors such as the cap on the Secretariat's budget and the difficulty in attracting and retaining experienced lawyers who would otherwise prefer the lucrative private practice present challenges to this solution.

K. *Translation Issues*

In keeping with the different linguistic backgrounds of its Members, the WTO has three official working languages—English, French, and Spanish. According to the Ministerial Decision on the Procedures for the Circulation and Derestriction of WTO Documents,⁸¹ documents pertaining to disputes such as panel and AB reports, communications, status reports, etc. are required to be translated into all three languages before circulation. Translation of dispute-related documents is carried out by the Language Services and Documentation Division of the WTO

⁷⁸ Sacerdoti, *supra* note 42, at 22.

⁷⁹ Minutes of Meeting — 31 August 2015, *supra* note 35.

⁸⁰ *Urgent Challenges* – News Item, *supra* note 58.

⁸¹ General Council, Procedures for the Circulation and Derestriction of WTO Documents, Decision of 14 May 2002, WTO Doc. WT/L/452 (May 16, 2002).

Secretariat.⁸² Moreover, after these documents have been finalised, their circulation has to be done simultaneously in all three languages.⁸³

Translation can be a time-consuming process, especially if it involves translation of legal language and the documentation (such as the reports, party submissions, etc.) is voluminous. In addition, the time required for completion of the panel/AB reports can be impacted if there is a mismatch between the demand for translation services, and the number of staff available for translation. The process is further complicated if proceedings are being conducted in a language in which there may be a limited number of Secretariat staff who are proficient in that language. This particular factor was cited as a reason for delay in *Argentina — Financial Services* where proceedings were being conducted in Spanish and the shortage of Spanish-speaking legal staff entailed additional time to complete the proceedings.⁸⁴

The time required for translation of panel and AB reports is particularly problematic because even if they have been finalised, they cannot be circulated unless translated to the other two languages. The implication is that, in case of appeals, parties and third parties may remain unaware of the decision even if the AB has completed its work since the DSU requires the AB to circulate the report rather than issue it to the parties before circulation. In case of panel reports, while the parties may have access to the final report, the remaining Members would still have to wait till its circulation.

The concern arising out of delay in circulation due to translation issues is not a new one. In fact, it was first raised way back in June 1998, when Japan along with a few others had raised the issue of delay in circulation of the panel report in *Indonesia — Autos*.⁸⁵ The systemic implication of delays in circulation, as pointed out at the DSB meeting, is that it delays presenting the report to the DSB for adoption and thereby the implementation of the dispute's findings by the respondent.⁸⁶

VI. TIME TO CHANGE THE ENGINE? A PRESCRIPTION FOR REFORM

⁸² *Divisions*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/secre_e/div_e.htm (last visited Dec. 9, 2018).

⁸³ *Official Working Languages*, WORLD TRADE ORG., <https://docs.wto.org/gtd/Default.aspx?pagename=WTOLanguages&langue=e> (last visited Dec. 9, 2018).

⁸⁴ Communication from the Appellate Body, *Argentina — Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/9 (Jan. 4, 2016).

⁸⁵ WTO Dispute Settlement Body, *Minutes of Meeting (Held on 22 June 1998)*, WTO Doc. WT/DSB/M/46 at 15 (Aug. 6, 1998) [hereinafter Minutes of Meeting – 22 June 1998].

⁸⁶ *Id.*

Having discussed the various issues and challenges being faced by the panels and the AB in the timely adjudication of disputes, this Part discusses certain suggestions that could possibly remedy the situation. Some of the suggestions below may have already been discussed by other commentators and scholars. Nonetheless, I attempt to provide my personal perspective in discussing these.

A. Redesigning the Structure of Panels

Former AB Member, Giorgio Sacerdoti, has authored an insightful paper on the challenges being faced by the DSM on account of the increase in the number of disputes and the concomitant delays.⁸⁷ Sacerdoti attributes the 'inability of the DSM in its current form to cope with the increase in disputes in great part due to its structure, which at the panel and Secretariat levels is still basically patterned after the GATT model of panels'. According to Sacerdoti, panels continue to be staffed by panelists who are not professional judges or arbitrators; most of them are government officials or trade diplomats who lack a formal legal background and are thus heavily dependent on the Secretariat for dispute-related assistance, especially with regard to functions such as research, drafting, etc. Sacerdoti argues that this style of functioning goes against the professionalism required and the legalisation expected of the DSM.⁸⁸ In short, Sacerdoti argues that the current design of panels is out of tune with today's requirements of the DSM.

One argument that can be drawn from Sacerdoti's insightful analysis is that it is imperative to reconsider the current *ad hoc* nature of panels. Given that disputes have not only become a mainstay of the WTO, but are in fact increasing, some commentators have discussed making panels permanent in nature and composing them with tenured panelists (similar to the AB) who have a legal background and have some experience in adjudication. This would be in consonance with the judicialised and legalised nature of today's DSM and would also reduce the pressure on the Secretariat.

However, there are certain drawbacks with a permanent panel structure. First, disputing WTO Members would lose their control over selection of panelists which is one of the key features of the WTO panel adjudication stage. Second, all disputes for adjudication would end up queueing before a permanent panel if it has a heavy caseload, rather than be presented before a separate *ad hoc* panel, thereby causing more delays. This would result in a permanent panel facing the same issues the AB is currently facing (discussed in Part V.A). Lastly, if the recent impasse over the appointment of AB members is repeated in the appointment of permanent

⁸⁷ Sacerdoti, *supra* note 42.

⁸⁸ *Id.*

panelists, it would be catastrophic and could severely cripple the WTO's dispute settlement process.

It would make sense to have a hybrid model where there are a certain number of permanent panels staffed by tenured full-time panelists. These panelists could be selected in a manner deemed fit by the Membership.

B. Redesigning the Structure of the Appellate Body

Unlike panels, which are established and composed *ad hoc*, the AB is a permanent body consisting of seven members chosen from diverse backgrounds. Each AB Member has a term of four years and is eligible to be reappointed for a second term. Also, each AB Member has a part-time status and adjudicates appeals only when part of the division selected to sit on an appeal. However, the DSU, which has contained these structural requirements since 1995, has not kept up with the increase in the number of disputes and their qualitative and quantitative complexity over time. Mainly, the number of members constituting the AB, however, has not increased over time.

There is an urgent need to consider increasing the number of AB members by *at least* two. With nine AB members, it is possible to have three divisions functioning simultaneously without any overlap in composition.⁸⁹ Also, given the increase in the number and the complexity of appeals, the Membership may consider making the status of AB Members full time as against their present part-time status. As has been pointed out by a former AB Member, the current organisation of the AB leaves it little flexibility to cope with a regular higher number of cases.⁹⁰

The need for more AB Members has also been highlighted by the WTO Director-General, Roberto Azevedo. In his address to the DSB in September 2014, he highlighted the stress of the number of appeals on the appellate system.⁹¹ According to Azevedo:

“Under the current situation the 7 member AB can handle around 10-12 appeals at most per year. That’s stretching the envelope. And this is with AB Members working almost full-time. This operational cap is thus simply not enough given the level of demand. If, for example, Members decided to increase the number of members to 9, the

⁸⁹ The size of the AB could also be increased to eleven members. However, this would present additional challenges such as budget constraints, need for more AB Secretariat staff, etc.

⁹⁰ Sacerdoti, *supra* note 42, at 2.

⁹¹ *Urgent Challenges* – News Item, *supra* note 58.

maximum per year could be increased by approximately a third. This could potentially address the bottleneck at the AB stage to some degree.”

DG Azevedo is right in pointing out that increasing the number of AB members would increase the AB's capacity to adjudicate appeals. This would reduce the pressure on the AB to finalise its reports within the stipulated timelines. However, this is a decision that WTO Members need to take, the possibility of which seems very uncertain in light of the current deadlock in the appointment of new members to the AB.

C. Revising the Timelines in the DSU

The DSM, like many other aspects of the WTO, has remained unchanged. One of the aspects of the DSM that has remained unchanged and which requires immediate attention are the timelines prescribed in the DSU. This point was also made by the then AB Member, Seung Wha Chang. In his farewell address to the DSB, while complimenting the success and the importance of the DSM, Chang also highlighted how the DSM remained unevolved to meet the rising demand. According to Chang:⁹²

“Over the last twenty years, the WTO disputes have not only increased in number; they also have become more legalistic, more complex, and more sophisticated. This reflects the success of the WTO: national economies are more intertwined. It also reflects the increasing role of lawyers/litigators in WTO dispute settlement. The problem is, however, that this evolution appears not to have been contemplated in the DSU. For example: the 90-day time limit for appellate proceedings and the part-time status of Appellate Body Members appear to be incompatible with the increased size and complexity of appeals brought to the Appellate Body.”

The former AB Member was right on point. While the workload and complexity of disputes that the DSM is currently facing are clearly much more than what the DSM faced in its initial years, the DSU as an agreement has remained pretty much the same since its conception. The timelines stipulated in the DSU for completing adjudication of disputes by the panel and the AB therefore cannot be considered adequate and appropriate given the increased complexity, scale, and volume of disputes. There is an urgent need to review the DSU such that panels and the AB are given more time than that provided for in the DSU for adjudicating disputes.

⁹² Seung Wha Chang, *Farewell Speech at WTO Dispute Settlement Body* (Sept. 26, 2016), https://www.wto.org/english/news_e/news16_e/changfarwellspeech_e.pdf.

In fact, it is one of the principles of management that if a particular deadline cannot be met, especially repeatedly, and in spite of the best efforts of those involved, then the only possible conclusion is that the timelines are unrealistic and need to be revised. It is clear from the DSM's track record that the DSU's timelines are unrealistic, and in fact, have been since the beginning.⁹³ The timelines stipulated in the DSU can also be considered flawed since they do not accord extra time or foresee the possibility of extension on account of the panel's need to consult with experts which is the case in every SPS dispute.⁹⁴ Thus, it is imperative for the Membership to revise the DSU's timelines

D. Limiting Submissions Before the Panels and the AB

One of the challenges highlighted in the previous Part is the tendency of the complainant to raise a host of facts, claims, and legal issues before the panel as well as the AB. The complexity of submissions by the complainant has clearly increased in the recent past. Unless it is a case where the panel or the AB can exercise judicial economy, the panel/AB has to consider all the claims and legal submissions made by the parties. However, it is important to understand that not all claims and submissions made by a complainant may be material or essential to win the dispute. It may also be a case where the complainant is trying its luck in winning the dispute. Therefore, there is a need to consider limiting the submissions before the panels and the AB by devising a threshold.

It would be pertinent to note that in October 2015, the AB had made a suggestion for introducing limits on the length of written submissions with a view to managing its workload.⁹⁵ While certain Members supported the introduction of page limits, another section of the Membership opposed the introduction of any such limits and viewed them as an infringement of Members' due process rights.⁹⁶ As a result, due to the opposition from a number of Members, the AB's proposal did not carry forward. Though it might be correct to say that limiting submissions would impinge upon litigants' rights, in my opinion, a balance needs to be struck somewhere so as to ensure efficiency of the adjudicatory process.

⁹³ This is a point which has also been made in Kennedy, *supra* note 30, at 252.

⁹⁴ *WTO Analytical Index: Sanitary and Phytosanitary Measures: Article 6*, WORLD TRADE ORG., https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm (last visited Dec. 20, 2018) (in all cases to date, panels have selected experts in consultation with the parties).

⁹⁵ This proposal was made in JOB/AB/2 (Oct. 23, 2015), *cited in* Annual Report for 2016, *infra* note 97.

⁹⁶ WTO Appellate Body, *Annual Report for 2016*, WTO Doc. WT/AB/27 (May 16, 2017).

Another problem that arises at the appellate stage, and which has been highlighted in the previous Part, is the tendency of litigants to re-agitate their grievances on questions of law *en masse* before the AB irrespective of the significance of the particular question to the dispute. This can be contrasted with the system in certain domestic adjudicatory mechanisms such as in India, where not all civil disputes adjudicated by the state High Courts can be directly appealed before the Supreme Court of India (the highest court of appeal) as a matter of right. In India, only if a state High Court certifies that the case disposed by it involves a 'substantial question of law' can a party file a civil appeal before the Supreme Court.⁹⁷ In the absence of such a filter, the Supreme Court, which is ordinarily an extremely busy body, would be flooded with appeals from every state High Court.

One of the suggestions that this paper proposes is establishing a qualitative threshold for questions of law and legal interpretations that can be raised by parties in appeals. Such a system would ease the burden on a constrained AB and could preclude unnecessary litigation. It would be interesting to note the discussions during the Uruguay Round when negotiators were considering the need for an appellate review system. The United States was of the view that the appellate mechanism should be resorted to only in extraordinary cases rather than being an automatic opportunity for delaying the dispute settlement process.⁹⁸ Similarly, Canada was of the view that the appellate mechanism should serve as a means for correcting errors only in those "rare cases, where a party to a dispute considered that a panel's report . . . was so fundamentally flawed that it should not be accepted". Canada viewed the appellate mechanism as being intended for those cases where a party to a dispute considered that the panel had made a fundamental error in interpretation of rights and obligations and it should not become a 'quasi automatic step in the dispute settlement process'.⁹⁹

It is in this context that this paper proposes the consideration of a mechanism to review the issues raised and then decide whether or not to review the panel decision. This would provide a filter of sorts and discourage attempts at raising frivolous appeals.

⁹⁷ This is per Article 132(1) of the Constitution of India, 1950. In the alternative, if a High Court does not provide a certificate of appeal, an aggrieved party can seek special leave of the Supreme Court to file an appeal, if the party satisfies certain criteria. This is provided for in Article 136 of the Constitution of India, 1950.

⁹⁸ Negotiating Group on Dispute Settlement, *Communication from the United States*, MTN.GNG/NG13/W/40, at 5-6 (Apr. 6, 1990).

⁹⁹ Negotiating Group on Dispute Settlement, *Communication from Canada*, MTN.GNG/NG13/W/41, at 4 (June 28, 1990).

E. Remediating Remedies

Currently, the nature of remedies at the DSM is prospective in nature. Errant Members who cannot implement a panel/AB decision immediately, are given a 'reasonable period of time' under the DSU to bring their WTO-inconsistent measures in conformity with WTO law. On the other hand, remedies granting relief retrospective or provisional in nature are absent under the DSM.

A prospective system of remedies may be explained by the fact that Uruguay Round negotiators possibly expected that dispute settlement proceedings would be completed within the timeframes stipulated in the DSU. Hence, they might not have conceived of the need for provisional or retrospective remedies under the DSM. However, the situation is rather antithetical to what Uruguay Round negotiators might have conceived. Clearly, disputes are taking a longer time than what the timeframes under the DSU contemplate. It is quite possible that the prospective nature of remedies encourages Members to institute measures which would very likely be successfully challenged at the DSM. Factoring in the delays the DSM is currently facing, errant Members might be further encouraged to enact WTO-inconsistent measures in the expectation that they would be excused for a number of years till they were asked to remove the WTO-inconsistent measures pursuant to a panel/AB finding.

The delay in dispute resolution presents economic costs for its Members, as discussed in the previous part. Given this landscape where delays are becoming commonplace, it might be pertinent to consider retrospective remedies or provisional remedies. Though a proposal to incorporate provisional measures in the DSM exactly for the reason of delays was mooted by Mexico in the background of the DSU reforms,¹⁰⁰ not many Members supported this proposal. However, the chorus for alternate remedies has grown in light of the increasing delays at the DSM.¹⁰¹ The maxim '*justice delayed is justice denied*' becomes more apposite in a system such as the DSM which lacks both provisional and retrospective remedies.¹⁰²

¹⁰⁰ Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Mexico*, TN/DS/W/23 (Nov. 4, 2002).

¹⁰¹ This viewpoint has also been expressed by Brewster, *supra* note 39; Jayant Raghu Ram, *Revisiting the Idea of Provisional Measures in the WTO Dispute Settlement Mechanism*, 26(1) FLA. J. INT'L L. 197 (2014).

¹⁰² Kennedy, *supra* note 30, at 221.

F. *Emphasising Prevention Rather than Litigation*

The spirit and letter of the DSU emphasise mutual settlement of disputes between Members before an out-and-out trial commences. This may happen either through consultations or behind-the-doors negotiations between Members. In fact, a number of potential disputes do not become disputes and are actually resolved before a formal request for consultations is made by a prospective complainant. Yet another number of disputes are settled at the consultations stage or are left in a limbo, indicating that the complainant did not deem it necessary to proceed to the adjudicative stage.

Other platforms where potential disputes are discussed are the various Councils and Committees that are a part of the WTO's overall structure. These Councils and Committees serve as important platforms for Members to vent their grievances regarding other Members' WTO-inconsistent measures. Sympathetic WTO Members may then consider amending or removing the particular measures after considering all relevant factors. Though the precise benefit served by these Councils and Committees cannot be clearly ascertained and quantified, they can quite possibly play a facilitative role in the *prevention* of disputes before they actually need adjudication.

It is suggested through this paper that Councils and Committees could play an increased role in resolving disputes before they become actual disputes. At least as far as obvious violations are concerned, if Members could play a more nuanced role and apply persuasive pressure on the errant Member at these fora, it could be a major platform for resolving grievances before they proceed to the dispute stage. In fact, the TBT and SPS Committees play a major role in preventing disputes by providing a platform for the discussion of Specific Trade Concerns (STC) by Members against other countries' SPS and TBT measures. Henrik Horn et al. have argued that the STC mechanism significantly contributes to defusing trade tensions in the SPS and TBT areas.¹⁰³

Similarly, it would be very useful if other Committees and Councils in the WTO play a more nuanced role in addressing trade grievances before they become disputes. One constructive role Committees and Councils could play in this regard would be to form an *ad hoc* Working Group that could issue non-binding observations and recommendations concerning measures that are in obvious violation of WTO law. The purpose of such observations and recommendations

¹⁰³ Henrik Horn, Petros C. Mavroidis & Erik N. Wijkström, *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees*, 47 (4) J. World Trade 729, 730 (2013).

would be persuasive with the intent to coax the errant Member to consider the consistency of the violative measure with WTO law. Though such a mechanism cannot be compared with the 'stronger' DSM function, the central idea is using diplomatic pressure to coax an errant Member to consider withdrawing the measure before it escalates into a long-drawn dispute at the WTO.

G. Promoting Alternative Dispute Resolution at the WTO

In the domestic setup, limitations in traditional litigation systems, such as delays, have coaxed litigants to consider alternative methods of dispute resolution (ADR) such as arbitration, mediation, and conciliation. Even though ADR is a concept that has been in existence for more than a hundred years, there has been an increased preference for ADR in the recent decades. In fact, having a compulsory ADR clause in case a dispute arises has become a common facet of commercial and non-commercial agreements these days.

The DSU has provisions allowing for settlement of disputes through ADR means. While Article 5 of the DSU recognises the possibility of resorting to good officers, mediation, and conciliation, Article 25 recognises the possibility of binding arbitration that may be resorted to by disputing parties. In fact, Article 25.1 specifically recognises that expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes.

However, in spite of the same, the track record of the usage of these provisions at the WTO is quite dismal. To date, there has been only one dispute that has been settled through mediation at the WTO—the dispute involving Thailand, Philippines, and the EC over preferential tariffs on tuna products. Even arbitration under Article 25 has been resorted to only once—in *US — Section 110(5) Copyright Act*. It is possible that WTO Members are hesitant in using ADR methods for a number of reasons. One of the suggestions of this paper is that these reasons must be discussed by the Membership and barriers to effective utilisation of ADR methods at the WTO must be identified and removed. ADR methods could play a positive role in easing the burden on the WTO's dispute settlement mechanism.

H. Changing Member Attitudes

The primary target underlying complaints at the DSM is Members' behaviour. The main intention of the DSU is to *correct* errant behaviour rather than penalise it. The prospective nature of remedies contemplated under the DSU confirms the view that the DSM accords a 'benefit of doubt' to errant Members and accords some deference to state sovereignty. However, generally speaking, such a policy can encourage Members to take advantage of the system especially if it is one that is

mired in delays. It would not be incorrect to admit that this has become the case today. In the context of dispute settlement, this necessitates a need to engage in a demand-side reduction of disputes.¹⁰⁴ If Members are serious about the health of the DSM and its credibility, they must refrain from implementing measures that they themselves know are likely to be challenged for their WTO inconsistency.

One area where Member behaviour can impact the DSM's workload is compliance. Compliance panel proceedings are usually initiated by the original complainant with the objective of challenging the respondent's status of compliance with the original ruling. Compliance complaints are usually upheld most of the time,¹⁰⁵ indicating that the respondent has either not been serious in complying with the original panel's findings or that there are certain shortcomings in the respondent's implementation of the original award. Article 21.5 of the DSU was conceptualised with the genuine intention of giving the respondent a fair chance to prove compliance with the original award. Unfortunately, however, in some instances, respondents have increasingly resorted to Article 21.5 with the objective of extending the dispute resolution process.¹⁰⁶ The challenge that compliance proceedings present is that they can be as resource-intensive as the original panel dispute, especially if the original disputes themselves were highly complex.¹⁰⁷

I. Delinking Circulation from Translation

In the previous Part, the delays in circulation of panel and AB reports due to translation were discussed. At the DSB meeting of June 1998 referred to earlier, the United States had suggested that, "the overall operation of the [DSM] would be dramatically improved if panel reports could be derestricted and circulated as soon as they had been finalized and available in a single WTO language".¹⁰⁸ In such a case, it stated that, "[t]he official date of circulation for the DSU purposes would remain the date on which reports were available in all three WTO languages".¹⁰⁹ Given the merits of this practice, it is suggested that Members strongly consider delinking circulation of reports from the translation process.

J. More Information from the Secretariat

¹⁰⁴ Sacerdoti, *supra* note 42, at 14.

¹⁰⁵ *Id.* at 14-15.

¹⁰⁶ Brewster, *supra* note 39, at 121.

¹⁰⁷ Sacerdoti, *supra* note 42, at 14-15.

¹⁰⁸ Minutes of Meeting — 22 June 1998, *supra* note 85.

¹⁰⁹ *Id.*

At the DSB meeting of August 2015, Korea made a statement regarding the chronic delays plaguing the DSM. Among the many points raised, Korea mooted the importance of more information from the Secretariat regarding the docket status at the DSM.

According to Korea:¹¹⁰

"In order to discuss prescriptions, however, there was a need for an accurate diagnosis. Thus, it was critical that the Secretariat provide more information to Members on the specific constraints that it was facing. The information, updated regularly, should include hard numbers on staff members available to assist panels, and the allocation of staff among the various dispute settlement divisions of the Secretariat in relation to each division's evolving workload. Additionally, the Secretariat needed to provide case-specific information to the parties that could help them better understand how the Secretariat's across-the-board workload problems affected their disputes. This information needed to be detailed and tailored enough so that parties could appreciate in non-conceptual terms why, for instance, the Secretariat could not commit its staff to a case before a certain date. Information on the assignment of staff to each panel and each panel's place in the queue would also be appreciated. Korea had previously asked the Secretariat for such information, but the Secretariat, unfortunately, had been less than forthcoming."

As a Member, Korea very validly raised questions. Though panels and the AB are issuing the requisite statutory communications when they miss their deadlines, the Secretariats could play an additional role in supplementing the information provided in these statutory communications. Practically, it would be appropriate for the Secretariats to play a larger role in providing detailed and specific information given that the Secretariats discharge the main responsibility of facilitating disputes and assisting the panels and the AB. Furthermore, information regarding delays is important, for, only if Members have accurate and sufficient information regarding the delays can they come up with and discuss practical solutions.¹¹¹

VII. CONCLUSION

In the past, it was the opinion of many trade commentators that the increasing number of free trade agreements (FTA) would undermine the relevance of the WTO. Against this background, it was also contended that the WTO's DSM would face competition from the dispute settlement systems in these FTAs. However, the situation today is exactly the opposite. In spite of the increasing number of FTAs

¹¹⁰ Minutes of Meeting — 31 August 2015, *supra* note 35, at 22-23.

¹¹¹ *Id.* at 26 (Intervention by Brazil).

and increasing participation of WTO Members in the FTAs, WTO Members continue to bring trade disputes to the WTO's DSM. This reflects the reality that the WTO's DSM, for its obvious advantages, remains *the* preferred choice of settling trade disputes even when faced with the option of litigating these disputes under the FTAs.¹¹²

With over five hundred disputes consisting of more than two hundred panel reports, and around 140 AB reports, the WTO's DSM has been very active unlike the DSMs under the FTAs. Also, in comparison to the previous decade, the landscape of WTO dispute settlement has changed in more ways than one. Disputes coming before the DSM are fundamentally different from the disputes that the DSM faced in its infant years.¹¹³ They are more complex, more fact-intensive,¹¹⁴ and they also come in greater numbers than in the early years.¹¹⁵

However, the number of disputes brought before the DSM alone should not be a barometer of the DSM's health.¹¹⁶ Rather, it is the DSM's ability to process these disputes in accordance with the rules of the game, and within a reasonable timeframe, that is the real barometer of its health.¹¹⁷ Again, it is not merely the delay in settling disputes at the WTO that is the major concern. In fact, viewed against the background of the standard of delays in the domestic dispute resolution systems, and certain international dispute resolution systems, the standard of delays in the DSM is not extreme.¹¹⁸ The real concern is that a violating Member is legitimately allowed to maintain a measure, howsoever obvious the violation, while the complainant has no succour until the completion of the entire dispute resolution process in a heavily clogged system.¹¹⁹

As Director-General Azevedo himself has pointed out, it is 'extremely unlikely' that the surge in disputes over the past five years will dissipate over time.¹²⁰ With increasing trade among WTO members, an increase in Membership, and a rise in the protectionist tendencies of Members, the number of disputes among WTO

¹¹² It needs to be seen if things would be different with the coming into force of mega-FTAs such as the CPTPP and the RCEP (if negotiations conclude and it comes into force).

¹¹³ *Urgent Challenges* – News Item, *supra* note 58.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Sacerdoti, *supra* note 42, at 4.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ WTO Annual Report 2016, ch. 6: *Dispute Settlement*, at 112, https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_chap6_e.pdf (last visited Sept. 12, 2018).

Members will only continue to increase. Hence any measures to address the current challenges of the DSM to settle disputes in a time-bound manner should be considered with a long-term perspective.

At least as far as issues such as timelines, number of AB members, etc. are concerned, it is clear that the DSU needs to be revised to bring it into line with the current expectations of litigants at the WTO. Though Members initiated negotiations for reviewing the DSU nearly two decades ago, they may need to reconsider the approach of these negotiations for two reasons. *First*, the scope of negotiations on the DSU review at present does not cover the present challenges of delays being faced by the DSM. Issues currently covered under these negotiations such as sequencing, arose primarily out of challenges faced by the Membership in the first decade of the DSU. Thus, Members would need to prioritise negotiating solutions to issues concerning the prompt and effective settlement of disputes over other issues.¹²¹

Second, even though Members have agreed to decouple the DSU negotiations from the Doha Round negotiations,¹²² the realpolitik is that the DSU negotiations have been linked to the conclusion of the Doha Round negotiations. Thus, as per the current model, any new DSU issues that are intended to be discussed for rule-making at the WTO can possibly be considered only after conclusion of the current DSU negotiations, which, given the uncertainty of the Doha Round negotiations, is also uncertain.

This brings us to the alternative approach which Members may consider. If Members are really serious about exploring reform of the DSU to address the current logjam, they might consider the possibility of a separate track of negotiations to address the delays plaguing the DSM. Given the commonality of issues being faced, and concerns shared by Members cutting across the development divide, and the common desire to alleviate the delays facing the DSM, it might be possible for Members to find common ground in addressing these issues. However, it is very important for developing countries to ensure that any such reform does not put them at a disadvantage. In this context, the Membership should ensure that the reluctance of certain obstinate WTO Members to address developing country concerns does not potentially obstruct any possible solutions to the current situation.

¹²¹ This is a point which has also been made by the 2017 Chair of the AB, U.S. Bhatia. BHATIA *supra* note 2, at 71.

¹²² Doha WTO, Ministerial Declaration of 14 November, 2001, ¶ 47, WTO Doc. WT/MIN (01)/DEC/1 (Nov. 20, 2001).

One alternative to the formal negotiations route for addressing the current challenges has been suggested by Canada. According to Canada, Members could themselves voluntarily formulate best practices or agreements between parties to the dispute.¹²³ These could then be distilled and referred to for formal DSU negotiations at a later stage.¹²⁴

Against the larger backdrop, any approach should also involve a greater number of actors—practitioners, academics, the dispute settlement community, etc.¹²⁵ Also, it is imperative that *all* Members—and not just active users or those whose disputes are currently pending—take an interest in resolving the current situation.¹²⁶

In the midst of the current state of dispute settlement, one should not miss the positive aspect of the adjudicative functioning of the DSM—the quality of the panel and the AB decisions continue to remain high.¹²⁷ In fact, producing reports of a high quality is a responsibility which the AB in particular has to shoulder as it is the forum of last recourse and hence cannot afford to take shortcuts.¹²⁸ Against this background, what is thus needed is a *surgical reform* of the DSM.

To conclude, it would be appropriate to cite Russia's observation made at the DSB meeting of August 2015¹²⁹—*even the most precious and beautiful jewels need to be polished from time to time!*

¹²³ Minutes of Meeting – 31 August 2015, *supra* note 35, at 29 (Intervention by Canada).

¹²⁴ *Id.*

¹²⁵ *Id.* at 24 (Intervention by Guatemala).

¹²⁶ *Id.* at 26 (Intervention by Canada).

¹²⁷ *Urgent Challenges – News Item*, *supra* note 58.

¹²⁸ BHATIA, *supra* note 2, at 7.

¹²⁹ Minutes of Meeting – 31 August 2015, *supra* note 35, at 25.

ANNEXURES¹

ANNEX I – Delays in Original Panel Proceedings

Doc ket	Disput e	Date Panel Establi shed	Date Panel Comp osed	Time take n to com pose pane l after estab lish ment	First Statut ory Deadl ine (FSD)	Seco nd Statu tory Dead line (SSD)	Date Panel Report Issued	Del ay (in day s): FS D	Date Pane l Rep ort Circ ulate d	Del ay (in days): SSD
DS2	US- Gasolin e	10-Apr- 95	26-Apr- 95	16	26- Oct- 95	10- Jan- 96	17-Jan- 96	83	29- Jan- 96	19
DS8 /10- 1	Japan- Alcohol ic Beverag es	27-Sep- 95	30-Oct- 95	33	30- Apr- 96	27- Jun- 96	21-Jun- 96	52	11- Jul- 96	14
DS1 70	Canada -Patent	22-Sep- 99	22-Oct- 99	30	22- Apr- 00	22- Jun- 00	31- Mar-00	-22	5- May- 00	-48
DS1 22	Thailan d-Steel	19- Nov-99	20- Dec-99	31	20- Jun-00	19- Aug- 00	8-Sep- 00	80	28- Sep- 00	40
	First Set			54				93		87

¹ These annexures include the outlier disputes. Also, the annexures have been summarised for the purpose of this paper. Fuller details may be obtained from the database that will be hosted online.

The green-colored cells indicate that this date has been constructed by the author since the actual date on which the final panel report was issued to the parties has not been indicated by the panel anywhere.

DS1 41	EC- Bed Linen	27-Oct- 99	24-Jan- 00	89	24-Jul- 00	27- Jul- 00	10-Oct- 00	78	30- Oct- 00	95
DS1 55	Argenti- na- Leather	26-Jul- 99	31-Jan- 00	189	31-Jul- 00	26- Apr- 00	17- Nov-00	109	19- Dec- 00	237
DS3 12	Korea- Paper from Indone- sia	27-Sep- 04	25-Oct- 04	28	25- Apr- 05	27- Jun- 05	8-Oct- 05	166	28- Oct- 05	123
DS2 94	US- Zeroing	19- Mar-04	27-Oct- 04	222	27- Apr- 05	19- Dec- 04	28-Sep- 05	154	31- Oct- 05	316
	Second Set			79				128		158
DS3 22	US- Zeroing and Sunset Review s	28-Feb- 05	15-Apr- 05	46	15- Oct- 05	28- Nov- 05	20-Apr- 06	187	20- Sep- 06	296
DS3 15	EC- Select Custom Matters	21- Mar-05	27- May-05	67	27- Nov- 05	21- Dec- 05	31- Mar-06	124	16- Jun- 06	177
DS3 97	EC- Steel Fastene- rs	23-Oct- 09	9-Dec- 09	47	9-Jun- 10	23- Jul- 10	29-Sep- 10	112	3- Dec- 10	133
DS3 81	US- Tuna II (Mexic- o)	20-Apr- 09	14- Dec-09	238	14- Jun-10	20- Jan- 10	8-Jul-11	389	15- Sep- 11	603
	Third Set			87				333		379

DS3 99	US- Tyres (China)	19-Jan- 10	12- Mar-10	52	12- Sep-10	19- Oct- 10	8-Nov- 10	57	13- Dec- 10	55
DS3 94- 5/3 98	China- Raw Materia l	21- Dec-09	30- Mar-10	99	30- Sep-10	21- Sep- 10	1-Apr- 11	183	5-Jul- 11	287

DS4 42	EU- Fatty Alcohol s	25-Jun- 13	18- Dec-14	541	18- Jun-15	25- Mar- 14	23-Sep- 16	463	16- Dec- 16	997
DS4 79	Russia- Comme rcial Vehicle s	20-Oct- 14	18- Dec-14	59	18- Jun-15	20- Jul- 15	30-Sep- 16	470	27- Jan- 17	557
	Fourth Set			116				244		352
DS4 87	US- Condi tional Tax Incenti ves	23-Feb- 15	22-Apr- 15	58	22-Jul- 15	21- Jul- 15	29-Jul- 16	373	28- Nov- 16	496
DS4 83	China- Cellulos e Pulp	10- Mar-15	27-Apr- 15	48	27- Oct- 15	10- Dec- 15	16- Dec-16	416	25- Apr- 17	502

DS5 11	China- Domes tic Suppor t	25-Jan- 17	24-Jun- 17	150	24- Dec- 17	25- Oct- 17	<i>Pending</i>	188	<i>Pendi ng</i>	248
DS5 16	EU- Price Compa rison	21- Mar-17	10-Jul- 17	111	10- Jan-18	21- Dec- 17	<i>Pending</i>	171	<i>Pendi ng</i>	191
	Fifth Set			99				319		420

ANNEX II – Delays in Compliance Panel Proceedings

S. No	Docket	Dispute Name	Date of referral to panel	Formalities in composing panel/new panel	Time	Statutory Deadline	Date Circulated	Delay
1	DS27	EC-Bananas (Recourse by Ecuador) / (Recourse by EC)	12-Jan-99	18-Jan-99	6	12-Apr-99	12-Apr-99	0
2	DS18	Australia-Salmon	28-Jul-99	7-Sep-99	41	26-Oct-99	18-Feb-00	115
3	DS126	Australia-Leather	14-Oct-99	1-Nov-99	18	14-Jan-00	21-Jan-00	7
4	DS46	Brazil-Aircraft	9-Dec-99	17-Dec-99	8	23-Jan-00	9-May-00	107
5	DS70	Canada-Aircraft	9-Dec-99	17-Dec-99	8	23-Jan-00	9-May-00	107
		First Set			16			67
6	DS99	US-DRAMS	25-Apr-00	11-May-00	16	24-Jul-00	7-Nov-00	106
7	DS58	US-Shrimp	23-Oct-00	8-Nov-00	16	21-Jan-01	15-Jun-01	145
13	DS245	Japan-Apples	30-Jul-04	30-Jul-04	0	28-Oct-04	23-Jun-05	238
14	DS212	US-Countervailing Measures	27-Sep-04	8-Oct-04	11	26-Dec-04	17-Aug-05	234
		Second Set			17			148
15	DS108	US-FSC (Second)	17-Feb-05	2-May-05	74	18-May-05	30-Sep-05	135

		Recourse)						
16	DS277	US-ITC	25-Feb-05	2-Mar-05	5	26-May-05	15-Nov-05	173
25	DS294	US-Zeroing	25-Sep-07	30-Nov-07	66	24-Dec-07	17-Dec-08	359
26	DS322	US-Zeroing and Sunset Review	18-Apr-08	28-May-08	40	17-Jul-08	24-Apr-09	281
		Third Set			38			230
27	DS316	EC-LCA	13-Apr-12	17-Apr-12	4	12-Jul-12	22-Sep-16	1533
28	DS353	US-LCA II	23-Oct-12	30-Oct-12	7	21-Jan-13	9-Jun-17	1600
29	DS397	EC-Fasteners	18-Dec-13	27-Mar-14	99	18-Mar-14	7-Aug-15	507
30	DS381	US — Tuna II (Mexico)	22-Jan-14	27-Jan-14	5	22-Apr-14	14-Apr-15	357
		Fourth Set			29			999
31	DS381	US — Tuna II (US)/(Second Recourse by Mexico)	22-Jun-16	11-Jul-16	19	20-Sep-16	26-Oct-17	401
32	DS427	China-Broiler Products	22-Jun-16	18-Jul-16	26	20-Sep-16	18-Jan-18	485
36	DS461	Colombia — Textiles (Colombia)	6-Mar-17	6-Sep-17	184	4-Jun-17	pending	391

37	DS461	Colombia — Textiles (Panama)	19-Jun-17	6-Sep-17	79	17-Sep-17	pending	286
		Fifth Set			81			445

ANNEX III – Delays in Appellate Proceedings

S. No	Docket	Dispute Name	Date of notification of appeal	First Statutory Deadline	Second Statutory Deadline	Date circulated	Delay : FSD	Delay: SSD
1	DS2	US – Gasoline	21-Feb-96	21-Apr-96	21-May-96	29-Apr-96	8	-22
2	DS8/10-1	Japan – Alcoholic Beverages II	8-Aug-96	7-Oct-96	6-Nov-96	4-Oct-96	-3	-33
25	DS98	Korea — Dairy	15-Sep-99	14-Nov-99	14-Dec-99	14-Dec-99	30	0
26	DS108	US-FSC	26-Nov-99	25-Jan-00	24-Feb-00	24-Feb-00	30	0
		First Set					23	-6
27	DS138	US — Lead and Bismuth II	27-Jan-00	27-Mar-00	26-Apr-00	10-May-00	44	14
28	DS139/142	Canada — Autos	2-Mar-00	1-May-00	31-May-00	31-May-00	30	0
63	DS268	US — OCTG Sunset Reviews	31-Aug-04	1-Nov-04	29-Nov-04	29-Nov-04	28	0
64	DS267	US-Upland Cotton	18-Oct-04	17-Dec-04	16-Jan-05	3-Mar-05	76	46

		Second Set					34	5
65	DS285	US-Gambling	7-Jan-05	8-Mar-05	7-Apr-05	7-Apr-05	30	0
66	DS265-6/283	EC-Sugar	13-Jan-05	14-Mar-05	13-Apr-05	28-Apr-05	45	15
95	DS322	US — Zeroing (21.5-Japan)	20-May-09	20-Jul-09	18-Aug-09	18-Aug-09	29	0
96	DS363	China — Audio Visual	22-Sep-09	23-Nov-09	21-Dec-09	21-Dec-09	28	0
		Third Set					34	4
97	DS316	EC-LCA	21-Jul-10	20-Sep-10	19-Oct-10	18-May-11	240	211
98	DS367	Australia — Apples	31-Aug-10	30-Oct-10	29-Nov-10	29-Nov-10	30	0
117	DS438/444-45	Argentina-Import Measures	26-Sep-14	25-Nov-14	25-Dec-14	15-Jan-15	51	21
118	DS384/386	US-COOL (21.5)	28-Nov-14	27-Jan-15	26-Feb-15	18-May-15	111	81
		Fourth Set					67	37
119	DS429	US — Shrimp II (Viet Nam)	6-Jan-15	7-Mar-15	6-Apr-15	7-Apr-15	31	1
120	DS430	India-Agriculture Products	26-Jan-15	27-Mar-15	26-Apr-15	4-Jun-15	69	39

136	DS486	EU-PET(Pakistan)	4-Sep-17	3-Nov-17	3-Dec-17		239	209
137	DS316	EC-LCA (21.5)	13-Oct-16	12-Dec-16	11-Jan-17	15-May-18	565	535
		Fifth Set					152	123

ANNEX IV – Delays in RPT Arbitration Proceedings

S.No	Docket	Dispute Name	Date of Adoption of Panel/AB Report	Statutory Deadline	Date of issue of award	Delay
1	DS8/10-1	Japan - Alcohol	01-Nov-96	30-Jan-97	13-Feb-97	14
2	DS27	<u>EC - Bananas</u>	25-Sep-97	24-Dec-97	23-Dec-97	-1
5	DS18	<u>Australia - Salmon</u>	06-Nov-98	04-Feb-99	11-Feb-99	7
6	DS75/84	<u>Korea - Alcohol</u>	17-Feb-99	18-May-99	31-May-99	13
		First Set				14
7	DS87/110	<u>Chile - Alcohol</u>	12-Jan-00	11-Apr-00	19-May-00	38
8	DS114	<u>Canada - Pharmaceuticals</u>	07-Apr-00	06-Jul-00	11-Aug-00	36
17	DS246	<u>EC - Tariff Preferences</u>	20-Apr-04	19-Jul-04	10-Sep-04	53
18	DS268	<u>U.S. - OCTG Sunset Reviews</u>	17-Dec-04	17-Mar-05	27-May-05	71
		Second Set				48
19	DS285	<u>U.S. - Gambling Services</u>	20-Apr-05	19-Jul-05	28-Jul-05	9

25	DS366	<u>Colombia - Ports of Entry</u>	20-May-09	18-Aug-09	15-Sep-09	28
		Third Set				59
26	DS384 /386	<u>U.S. - COOL</u>	23-Jul-12	21-Oct-12	22-Nov-12	32
27	DS414	<u>China - GOES</u>	16-Nov-12	14-Feb-13	19-Apr-13	64
		Fourth Set				48
28	DS437	U.S. - Countervailing Measures (China)	16-Jan-15	16-Apr-15	07-Oct-15	174
29	DS429	U.S. - Shrimp II (Viet Nam)	22-Apr-15	21-Jul-15	27-Nov-15	129
30	DS457	Peru - Agricultural Products	31-Jul-15	29-Oct-15	11-Dec-15	43
31	DS461	Colombia - Textiles	22-Jun-16	20-Sep-16	02-Nov-16	43
32	DS464	U.S. - Washing Machines	26-Sep-16	25-Dec-16	28-Mar-17	93
		Fifth Set				96

ANNEX V – Delays in Retaliation Arbitration Proceedings

S.No	Docket	Dispute Name	Date of Expiry of RPT	Statutory Deadline	Date of Award	Delay
1	DS381	U.S. - Tuna II (Mexico)	13-Jul-13	11-Sep-13	25-Apr-17	1322
2	DS384 /6	U.S. - COOL	23-May-13	22-Jul-13	07-Dec-15	868
3	DS267	U.S. - Cotton Subsidies (SCM 7.10)	01-Jul-05	30-Aug-05	31-Aug-09	1462
4	DS267	U.S. - Cotton Subsidies (SCM 4.11)	01-Jul-05	30-Aug-05	31-Aug-09	1462
5	DS285	U.S. - Gambling Services	03-Apr-06	02-Jun-06	21-Dec-07	567
6	DS217 /234	U.S. - Offset Act	27-Dec-03	25-Feb-04	31-Aug-04	188

7	DS136	U.S. - 1916 Act	31-Dec-01	01-Mar-02	24-Feb-04	725
8	DS222	Canada - Aircraft II	20-May-02	19-Jul-02	17-Feb-03	213
9	DS108	U.S. - FSC	01-Nov-00	31-Dec-00	30-Aug-02	607
10	DS46	Brazil - Aircraft	18-Nov-99	17-Jan-00	28-Aug-00	224
11	DS27	EC - Bananas (Ecuador)	01-Jan-99	02-Mar-99	24-Mar-00	388
12	DS48/ 26	EC - Hormones	13-Aug-98	12-Oct-98	12-Jul-99	273
13	DS27	EC - Bananas (US)	01-Jan-99	02-Mar-99	09-Apr-99	38