The WTO in the Twenty-first Century
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Arbitration as an alternative to litigation in the WTO: observations in the light of the 2005 Banana Tariff Arbitrations

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This [Arbital] Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer up of strife.

At the inauguration of the London Court of Arbitration in 1892

Commercial arbitration is... uncommonly well adapted to developing new rules and practices better suited to the conditions of the modern world.

Sir Robert Jennings

The 2005 Banana Tariff Arbitrations were arguably the most important arbitrations to have been conducted under the auspices of the World Trade Organization (WTO). These arbitrations examined issues of economic and political significance for the multiple complainants and third parties involved. They raised questions of substantive complexity entailing a workload comparable to litigation in WTO panel and Appellate Body proceedings. The Banana Tariff Arbitrations were however unique compared to previous cases litigated in the WTO. They were held outside the scope of normal WTO dispute settlement procedures set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and, as such, were the first sui generis arbitrations held under the auspices of the WTO. Furthermore, they involved procedures and time-frames that differed significantly from cases previously litigated in the WTO and were completed extremely expeditiously in comparison. Arguably, as an alternative to litigation in the WTO, the Banana Tariff Arbitrations were a resounding success.

Despite their effectiveness, beyond the mandatory use of arbitration as a step in the implementation stage of WTO dispute settlement proceedings, the Banana Tariff Arbitrations were only the second time that WTO Members had consented to arbitration as means to resolve a dispute in the WTO. The first occasion, the arbitration in US – Section 110(5) Copyright Act (Article 25) (herein, the 'Copyright Arbitration'), also successfully resolved the dispute.

In contrast to the limited use of voluntary arbitration in the WTO, in private international commercial disputes arbitration has superseded litigation as the preferred means of dispute settlement. In the context of private international commercial disputes it has been noted that, while there used to be a debate on the advantages and disadvantages of arbitration as opposed to litigation, 'opinion has shifted strongly in favour of international arbitration for the resolution of disputes involving international commerce', and that, where disputes arise from 'an international business transaction, the balance comes down very firmly in favour of arbitration.'

In the light of the recent successful arbitrations in the WTO, and the prominence of arbitration in international commercial dispute

5 Articles 21.3(c) and 22.6 of the DSU envisage arbitration for resolving discrete questions relating to the implementation of recommendations and rulings of the Dispute Settlement Body (DSB). They are not the focus of this chapter as they cannot operate as an alternative to litigation for resolving more general disputes in the WTO (See the last paragraph of section II.1 of this chapter).

6 Award of the Arbitrators, US – Section 110(5) Copyright Act (Article 25) (See section II.2(b) of this chapter).

7 Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, The Law and Practice of International Commercial Arbitration (4th edn, London, 2004), paras. 1–01. By way of illustration, in 2005 the International Chamber of Commerce received 521 requests for arbitration of which the amount in dispute exceeded US$1,000,000 in over 50 per cent of cases. In 1986, the International Chamber of Commerce received 344 requests. (See <http://www.iccwbo.org/court/english/right_topics/stat_2005.asp>.) Other arbitral institutions also report an increasing number of cases (for example, see the statistics collected at: <http://www.hkiac.org/HKIAC/HKIAC_English/main.html>), and this does not tell the whole story as many (perhaps most) arbitrations are conducted without the involvement of an arbitral institution.

8 Redfern and Hunter et al., International Commercial Arbitration, paras. 1–50 and 1–51.
settlement outside the WTO, this chapter analyzes the potential of arbitration as an alternative to litigation in the WTO. In doing so, this chapter outlines the reasons why arbitration has been preferred in private international commercial disputes and examines whether similar conditions occur in the WTO context. The conclusion is that the same conditions do not fully apply in the WTO and, therefore, the potential of arbitration as an alternative to litigation in the WTO is limited to certain specific situations. These situations include disputes where both parties want an expeditious and binding determination or to ensure strict confidentiality, as well as where the dispute relates to an area that is not directly enforceable under the DSU, such as the conditions of a waiver or a mutually agreed solution (MAS). The chapter concludes with certain considerations when structuring arbitration as an alternative to litigation in the WTO.

I. Arbitration compared to litigation and ‘alternative dispute resolution’

In dispute settlement theory, a distinction is typically made between legal means of dispute resolution and diplomatic means of dispute resolution. Legal means of dispute resolution include arbitration and litigation and are characterized by a binding decision based on the law. Diplomatic means of dispute resolution include the so-called ‘alternative dispute resolution’ (ADR) mechanisms such as good offices, conciliation, mediation, and inquiry, and are characterized by non-binding recommendations based on the parties' underlying interests.

Distinguishing arbitration from litigation is not as straightforward as both involve an independent third party making a binding decision on the basis of predetermined rules. There are, however, some important structural differences between arbitration and litigation.

In contrast to litigation where the dispute is referred to a standing court with pre-established procedures, arbitration requires the parties to set up the machinery to handle the dispute themselves. In this regard, parties to an arbitration are ‘masters of the arbitral process to an extent impossible in proceedings in a court of law.’ For example, arbitration typically permits the parties to decide the number and method of appointment of the arbitral tribunal, the powers the tribunal should possess, and how the proceedings are to be conducted (for example, the number and nature of submissions and oral hearings, the time-limit for the issuance of the award, whether the award can be appealed, etc.). Importantly, arbitration also grants the parties control over the jurisdiction of the arbitral tribunal and the basis for its decision. In this manner, the parties can instruct the arbitral tribunal to decide the matter exclusively in accordance with municipal law, international law, equity, a combination of those rules, or some other rules. It has been said that this characteristic of arbitration is a key element in encouraging inter-state arbitration as it enables the parties to exercise close control over the process. Notably, if it turns out that the framework prescribed by the parties has been deviated from by the arbitral tribunal this may be grounds for setting aside the decision. However, this does not usually extend to review of errors of law or fact, which tends to make arbitration faster than litigation.

Arbitration very often differs significantly from ADR mechanisms such as good offices, conciliation, mediation and inquiry. Linguistically, ADR should encompass all forms of dispute resolution that are ‘alternatives’ to litigation. Generally, however, arbitration has been distinguished from ADR mechanisms which do not result in binding decisions but rather non-binding recommendations to the parties. This characteristic of ADR is consistent with its purpose, which is not to determine who is legally correct and who is legally wrong, but rather to facilitate a mutually agreeable solution by reconciling both parties' interests.

This chapter does not analyze the potential of ADR (in the narrower sense) as an alternative to litigation in the WTO. Nonetheless, it ought to be noted that various provisions in the DSU provide WTO Members with the possibility to resort to the ADR mechanisms of good offices, conciliation and mediation as alternatives or supplements to litigation if they so agree. While these procedures have been seldom used in

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14 However, at times there may be considerable overlap between arbitration and other ADR mechanisms. For example, some forms of ADR can involve considerable direction from the third-party facilitator, such as 'evaluative' mediation by a retired judge.
15 Article 5 of the DSU, and also Articles 3.12 and 24.2 of the DSU if the dispute involves at least one developing-country Member or least-developed-country Member.
practice, there have been calls to further promote their use in the future and one recent successful mediation by the WTO Director-General. These circumstances suggest that these mechanisms may also warrant further analysis. In addition, some commentators have noted that ADR may play a useful role as an alternative to the compulsory consultations required under Article 4.11 of the DSU prior to panel and Appellate Body proceedings. It may also be feasible to incorporate mediation into the WTO arbitration processes discussed in this chapter, mirroring the increased interest and experience in 'arb-med' (arbitration-mediation) in international commercial arbitration involving private parties.

II. Arbitration in the WTO

I. The current provisions providing for arbitration in the WTO agreements

Article 25 of the DSU relates exclusively to arbitration recognizing that

Typical of arbitration more generally, arbitration under Article 25 of the DSU is subject to the 'mutual agreement of the parties', who are also required to 'agree on the procedures to be followed'. Thus, it is for WTO Members to decide on the number and method of appointment of the arbitrator, the manner in which the proceedings are to be conducted, the issues to be decided and, for sui generis arbitrations, the applicable law.

There are few constraints on Article 25 arbitrations. These constraints are that the parties notify their agreement to resort to arbitration to all WTO Members sufficiently in advance of commencing arbitration; that they notify the award to the Dispute Settlement Body (DSB) and any relevant committees; and that they 'agree to abide by the arbitration award' to which Articles 21 and 22 of the DSU relating to implementation apply. Another possible constraint is the requirement in Article 3.5 of the DSU stipulating that arbitration awards shall be consistent with the WTO agreements and shall not impede the objectives of, or nullify or impair benefits under, those agreements. Other WTO Members have no rights to participate in an Article 25 arbitration unless there is agreement by the parties to the arbitration allowing for their participation. While an arbitration award must be notified to the DSB, it becomes binding on the parties immediately and is not conditional on DSB approval.

The DSU also envisages mandatory arbitration under Articles 21.3(c) and 22.6 of the DSU as steps in the implementation stage of a dispute. Article 21.3(c) provides that the 'reasonable period of time' for implementation of recommendations and rulings of the DSB shall be determined 'through binding arbitration' where the parties to the dispute cannot reach mutual agreement on the time period; and Article 22.6 provides that where a Member objects to the 'level of suspension' of concessions or obligations authorized by the DSB in retaliation for non-implementation of its recommendations and rulings it can refer that question to arbitration. These arbitrations will not be the focus of this chapter, as they are only capable of resolving discrete questions relating to the implementation of recommendations and rulings of the DSB. As such, these mandatory arbitrations do not operate as an alternative to litigation for resolving more general disputes in the WTO, in contrast to the

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16 Article 5 of the DSU has never been utilized. Article 3.12 of the DSU also has never been utilized, however, the provisions of the Decision of 5 April 1996 on Procedures Under Article XXIII to which it refers have been resorted to by developing countries on six occasions between 1978 and 1993. (See WTO, Analytical Index: Guide to GATT Law and Practice (Geneva, 1995), Vol. 2, pp. 765-766.)

17 See, for example, Article 5 of the Dispute Settlement Understanding, Communication from the Director-General, WT/DSB/25, 17 July 2001.

18 See Request for Mediation by the Philippines, Thailand and the European Communities, Joint Communication from the European Communities, 1 August 2003; as well as, Request for Mediation by the Philippines, Thailand and the European Communities, Communication from the Director-General, WT/GC/66 and WT/GC/66/Add.1. See also Donald McRae, 'What is the Future of WTO Dispute Settlement?' (2004) 7(1) Journal of International Economic Law 3-17, 9-10.

19 McRae has noted that 'the utility of those consultations is questionable' and points to proposals to 'turn them into a facilitated process' (See McRae, 'Future of the WTO Dispute Settlement', 10.) Davey has also noted that in improving the prospects of settlement in consultations, 'one possibility that could be usefully explored is a greater use of mediation or conciliation' (See William I. Davey, 'WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding "Over-legalisation"', in Macko Bronkers and Reinhard Quick (eds), New Directions in International Economic Law: Essays in Honour of John H. Jackson (The Hague, 2000), 291-307, at 295.


21 Article 25.3 of the DSU.

22 Arbitrations under Article 25 of the DSU would appear limited to examinations of issues under the 'covered agreements', as provided for under Article 1 of the DSU. Sui generis arbitrations do not have the same limitation, allowing the applicable law to be broader. (See discussion in section IV.2(c) of this chapter.)

23 Articles 25.2, 25.3, and 25.4 of the DSU.

24 Article 25.3 of the DSU.
procedures envisaged under Article 25 of the DSU or those of sui generis arbitrations. For this same reason, the arbitration procedures envisaged under both the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Trade in Services (GATS) are also not the focus of this chapter.

2. The practice of arbitration in the WTO

(a) The 2005 Banana Tariff Arbitrations

On 1 August 2005 the arbitral tribunal issued its award in the First Banana Tariff Arbitration, and on 27 October 2005 the arbitral tribunal issued its award in the Second Banana Tariff Arbitration. These arbitrations were not held pursuant to Article 25 of the DSU and outside the scope of normal WTO dispute settlement procedures in the DSU. Rather, they were based on procedures outlined in a waiver of the European Communities' obligation under Article I:1 of the General Agreement on Tariffs and Trade (GATT) 1994, contained in the document 'European Communities - The ACP-EC Partnership Agreement, Decision of 14 November 2001' (the so-called 'Doha Waiver'). As such, they were the first sui generis arbitrations to be held under the auspices of the WTO.

The Doha Waiver granted the European Communities a waiver from the most-favoured-nation (MFN) obligation under Article I:1 of the GATT 1994 until 31 December 2007 to the extent necessary to permit the European Communities to provide preferential tariff treatment for imports of products originating in African, Caribbean, and Pacific (ACP) States as required by the ACP-EC Partnership Agreement in Article 36.3, Annex V, and its Protocols.

This commitment was made in the context of understandings of the European Communities reached with Ecuador and the United States as part of the resolution of the EC - bananas III dispute, whereby the European Communities was to 'introduce a Tariff Only regime for imports of bananas no later than 31 December 2006'. (See European Communities - Regulation for the Importation, Sale and Distribution of Bananas, Understanding on bananas between Ecuador and the EC, WT/DS27/160, G/C/W/274, 9 July 2001, p. 2, para. B; and European Communities - Regulation for the Importation, Sale and Distribution of Bananas, Communication from the United States, WT/DS27/59, G/C/W/270, 2 July 2001, p. 2, para. B.)

The Doha Waiver, I, 1th preambular paragraph. 28

Ibid. 29

Colombia, Costa Rica, Ecuador, Guatemala, Honduras, and Panama followed by Brazil, Nicaragua, and Venezuela in the ensuing days. (See European Communities - The ACP-EC Partnership Agreement - Recourse to Arbitration Pursuant to the Annex to the Decision of 14 November 2001, WT/L/607/Add.1 to Add.9.)

Article XXVIII:5 Negotiations, Schedule CXL - European Communities, Addendum, G/SECRET/22/Add.1, 1 February 2005.

The arbitrator determined that the European Communities envisaged re- binding (of €230/tonne) would not result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market access commitments relating to bananas. (See Award of the Arbitrator, EC - The ACP-EC Partnership Agreement, para. 94.)

Annex to the Article I Doha Waiver, 5th tier.
of three individuals to undertake that task. It was chaired by John Weekes, a former Canadian Ambassador to the WTO and Chair of the WTO General Council, and included two Appellate Body members, Judge John Lockhart and Professor Yasuhei Taniguchi. To support the arbitral tribunal, WTO staff were made available from an unprecedented four Divisions: Legal Affairs, the Appellate Body Secretariat, Agriculture, and Economic Research and Statistics. This can be contrasted with Appellate Body proceedings, where the Appellate Body members are exclusively serviced with staff from the Appellate Body Secretariat, and panel proceedings where panelists are serviced with staff from the Legal Affairs Division or Rules Division and, on occasion, staff from one other division. The breadth of WTO Secretariat support provided to the arbitral tribunal reflected the substantive scope and complexity of the dispute.

One of the most noteworthy aspects of the 2005 Banana Tariff Arbitrations was the speed with which the entire proceedings were completed. The First Banana Tariff Arbitration was requested on 30 March 2005, and the award of the arbitral tribunal issued four months later on 1 August 2005. This period of time included 30 days for the selection of the arbitrators, and 90 days to then render an award. The Second Banana Tariff Arbitration was even quicker, as it was requested on 26 September 2005 and the award issued a mere 30 days later on 27 October 2005. Both Banana Tariff Arbitrations resulted in written awards of the arbitral tribunal, which were notified to the General Council of the WTO and made available to all WTO Members as well as to the public through the WTO website.

(b) The Copyright Arbitration

The Copyright Arbitration was the first and only time since the establishment of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU. The Copyright Arbitration was intended to address a specific issue arising in the context of the implementation of the panel report in US – Section 110(5) Copyright Act. That panel report upheld the European Communities’ argument that Section 110(5)(B) of

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38 Annex to the Doha Waiver, 4th tier, providing that if there was a failure of the parties to agree on the arbitrator within ten days, then the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request.


40 Award of the Arbitrator, EC – The ACP-EC Partnership Agreement II, para. 9.
the arbitrators noted, 'one of the main concerns expressed by the parties when this matter was referred to arbitration was that we proceed expeditiously.' In response to this desire, the request for arbitration was made on 23 July 2001, the arbitrators selected by 13 August 2001, and the award issued to the parties two months later, on 12 October 2001. The entire proceeding, from the request for arbitration to notification of the award to the DSB and TRIPS Council on 9 November 2001, was completed in less than four months. As with the Banana Tariff Arbitrations, the Copyright Arbitration resulted in a written award of the arbitrators, which was notified to the DSB and the TRIPS Council and made available to all WTO Members as well as to the public through the WTO website.

III. Arbitration in private international commercial disputes

As noted at the outset of this chapter, arbitration has superseded litigation as the preferred means of dispute settlement in private international commercial disputes. There are four principal reasons why this preference has developed.

1. The advantages of arbitration over litigation in private international commercial disputes

(a) The decision is internationally enforceable against the losing party

Probably the main reason why parties now use arbitration rather than national courts in private international commercial disputes is that the judgment of a national court is generally only enforceable domestically. In contrast, thanks to a network of regional and international treaties, particularly the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), arbitration leads to an award which tends to be legally enforceable in many jurisdictions. As of June 2006, there were 137 signatories to the New York Convention.
York Convention, including most major trading nations, developing countries, and least-developed countries (LDCs), making it one of the world’s most widely ratified multilateral treaties. Inspired by this success, on 30 June 2005, The Hague Conference on Private International Law concluded a Convention on Choice of Court Agreements. That convention provides that, in principle, a chosen domestic court’s judgment would be enforceable in other states that had ratified the convention. However, as of June 2006, no states have ratified the convention. Even if it gains a similar number of adherents as the New York Convention, commercial parties will still need to be persuaded that courts are more suited to resolving private international commercial disputes than arbitrators chosen by the parties.

(b) The lack of an international court

Unless disputes are between states, and therefore the states concerned could submit the case to the WTO dispute settlement system or the International Court of Justice (ICJ), ‘there is no [international] court to deal with international commercial disputes’. Consequently, parties wishing to enforce private legal rights through the courts need to rely on domestic courts. In an international context, however, these domestic courts have the disadvantage that they are often foreign to the claimant, may be in a jurisdiction that is relatively inexperienced in dealing with international commercial transactions, may use a language different to that of the essential documents and evidence, and may require the claimant to rely on the services of foreign lawyers. For these reasons, Redfern and Hunter conclude that for business people, ‘the prospect of bringing a claim arising out of an international business transaction before a foreign court is unattractive’.

In contrast, arbitration allows the parties to argue their differences using their own lawyers, in an increasingly familiar forum combining elements of common and civil law traditions, in front of arbitrators who are usually selected because of their familiarity with the international commercial transactions being examined. Arbitration thus offers a ‘neutral forum,’ as opposed to the other party’s domestic courts.

(c) Flexible, faster, and cheaper proceedings

The flexibility of arbitral proceedings, derived from party autonomy to develop the arbitration’s procedures, provides the potential for arbitration to be a faster and cheaper alternative to litigation. As we have seen, unlike litigation where disputes are referred to a standing court with pre-established procedures, arbitration allows parties the freedom to work out for themselves the procedures best suited to the particular circumstances of the particular dispute. This flexibility, extending to the number and nature of submissions and hearings, the time-limit for issuance of the award, and whether the award can be appealed, can have important implications on the time and costs of the proceedings.

At a time when litigation is becoming increasingly lengthy and costly in many jurisdictions (due to, amongst others, overcrowding of court lists, an over-legalization of the process, extended procedural delaying tactics, and long appeal processes), these advantages of arbitration have proved attractive.

That said, as confirmed in a survey published in 1996, by around 1990 many practitioners had become concerned that international commercial arbitration had become only slightly faster and no cheaper than litigation. Blame for this tended to be attributed to the involvement of large Anglo-American law firms extending sophisticated litigation management techniques developed in domestic common law contexts; and, more broadly, to a new generation of specialists in international commercial arbitration.

Nonetheless, by the late 1990s there were signs that arbitration practitioners, institutions, and law-makers were responding to such

54 See King, Arbitration 254–62.
55 Redfern and Hunter et al., International Commercial Arbitration, paras. 1–51.
56 Ibid.
58 See section 1 of this chapter.
concerns. While it seems that the main improvements have come in more expeditious proceedings as opposed to savings in costs, the flexibility of arbitration proceedings continues to be a reason for its preference over litigation in private international commercial disputes.

(d) Confidentiality
Confidentiality is another major reason that arbitration is preferred over litigation. Unlike proceedings in many domestic courts, where the press and public have access to the proceedings or the record of the proceedings, international commercial arbitration tends not to be open to the public. As a former Secretary-General of the International Chamber of Commerce put it:

The users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value on confidentiality as a fundamental characteristic of international commercial arbitration. When enquiring as to the features of international commercial arbitration which attracted parties to it as opposed to litigation, confidentiality of the proceedings and the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably mentioned.

However, there remains considerable variation among national legal systems about the applicability and scope of confidentiality obligations in arbitrations.

IV. Observations on the applicability of arbitration as an alternative to litigation in the WTO

1. The advantages of arbitration over litigation in private international commercial disputes do not fully apply in the WTO context

Having outlined the main reasons why arbitration has been preferred over litigation in private international commercial disputes, this section examines whether similar conditions occur in the WTO context.

The motivation for preferring arbitration over litigation in private international commercial disputes due to the lack of an international court to resolve private international commercial disputes does not exist in the WTO context as the WTO panels and the Appellate Body provide an international 'court' able to resolve WTO law disputes. As the WTO dispute settlement system also contains enforcement mechanisms, the motivation of ensuring the enforcement of the decision that exists in the private international commercial context also does not apply in the WTO context. For these reasons, it would appear that the conditions motivating the use of private international commercial arbitration do not fully apply in the WTO context.

Nonetheless, a preference for arbitration over litigation in a WTO context might occur in certain specific situations, such as where both parties want an expeditious yet binding solution, and/or to ensure stricter confidentiality. It might also occur in situations where the dispute would not otherwise be directly enforceable under the DSU, such as disputes over compliance with the conditions to waivers or MAS. These specific situations are examined below.

2. Arbitration may serve as an alternative to litigation in specific circumstances

(a) Disputes where both parties want an expeditious determination

Article 3.3 of the DSU emphasizes that 'prompt settlement of [disputes] is essential to the effective functioning of the WTO and a proper balance between the rights and obligations of WTO Members'. Despite this goal of prompt settlement of disputes, delay is one of the major criticisms of litigation undertaken in the WTO dispute settlement system. William Davey, former Director of the Legal Affairs Division, concludes an analysis of the first ten years of the WTO dispute settlement system with the observation that 'experience to date suggests that one problem with the WTO dispute settlement system is that in too many cases, it takes too long to resolve disputes'. Davey notes that the consequences of these delays could be considerable as 'the delays do make the system less attractive to businesses and could in the long run lead to less and less use of the system.'

By way of illustration of the time periods typical for litigation in the WTO, normal panel proceedings have taken an average of 14 months from the date of establishment of the panel to the date the DSB considers the panel report for adoption.\(^69\) This period of time surpasses the general rule in Article 20 of the DSU to 'not exceed nine months' for this stage of the litigation. Furthermore, panel proceedings are not the sole stage in litigation in the WTO, as they must be preceded by formal consultations which in general require a minimum two-month period.\(^70\) Members also have the right to appeal the panel report to the Appellate Body, an appeal process which may add a further three months to the litigation process. Thus, on average, panel proceedings have taken at least 16 months for completion, a period that can be three months longer if appealed.

In contrast to these lengthy time periods for the completion of litigation in the WTO, the time periods for completion of the 2005 Banana Tariff Arbitrations and the Copyright Arbitration were extremely expeditious. The period between the request for the First Banana Tariff Arbitration and the issuance of the award was four months, a time period that was reduced to a mere one month for the Second Banana Tariff Arbitration. The Copyright Arbitration responded to the concerns of the European Communities and the United States for a rapid decision by rendering its award within four months of the request for arbitration.

The significance of the speed with which these arbitrations have been completed, when compared to the considerable delays in litigation in the WTO, may provide the primary motivation for Members selecting arbitration as an alternative to litigation to resolve future disputes in the WTO. Trade disputes in the WTO are typically motivated by commercial opportunities for private businesses in foreign or domestic markets through the removal of protectionist measures.\(^71\) Where those businesses are confronted with the choice between the numerous delays the litigation approach entails, and the extremely expeditious option of arbitration, one would often expect a clear preference for arbitration. This is particularly so in the WTO system, where there are no retrospective remedies for businesses affected by illegal protectionist measures. Unfortunately, this advantage of arbitration for a claimant may be perceived as a disadvantage for any respondent wishing to maintain illegal measures for as long as possible. In such situations it may be difficult to achieve the mutual agreement of the parties required for arbitration. However, this difficulty may not arise as often as expected, as even private businesses of a respondent Member may value certainty with respect to their commercial landscape, rather than being in 'limbo' during potentially years of litigation, which may have a chilling effect on investments, long-term contracts, and hinder the ability to undertake desired adjustments. Even governments who think they may lose WTO law disputes may prefer to have a clear result sooner rather than later, for example, to force reform on recalcitrant vested interests at home.

It should however be noted that, while the time period for arbitration has, so far, been considerably quicker than that for litigation, Article 25 arbitration envisages an additional time period relating to the implementation of the arbitrator's award akin to that relating to the implementation of recommendations and rulings of the DSB following panel or Appellate Body litigation. Article 25 of the DSU provides that 'Articles 21 and 22 of [the DSU] apply mutatis mutandis to arbitration awards'. Consequently, if a Member cannot comply immediately with the award, it is granted a reasonable period to do so, which as a guide should not exceed fifteen months from adoption.\(^72\) In addition, there is the potential for panel proceedings under Article 21.5 of the DSU to determine whether a Member has complied with the award, as well as arbitration under Article 22.6 of the DSU where there is disagreement on the level of suspension of concessions that may be applied where there is a lack of implementation. While these time periods could cause further delays in the implementation of Article 25 arbitration awards, they are necessary for WTO litigation processes as well. They are not, however, required following sui generis arbitration.\(^73\)

\(^69\) As of 6 March 2006, the average number of days between the establishment of the panel by the DSB and the date the DSB considers the panel report for adoption for all disputes adopted by the DSB that were not appealed was 441 days. (See <http://www.worldtradelaw.net/dsc/database/adoptiontiming1.asp>.)

\(^70\) Pursuant to Article 4.7 of the DSU, the period between the request for consultations and the establishment of the panel is normally 60 days (Article 4.7 of the DSU). Pursuant to Articles 4.3 and 4.6 of the DSU, this period may be shorter, between ten and 60 days. In exceptional circumstances that the Member being consulted does not respond within ten days of receipt of the request, does not consult within 30 days of the receipt of the request, or agrees that consultations have failed to settle the dispute.

\(^71\) WTO disputes are on occasion initiated also for systemic reasons, or to achieve clarity of the law.

\(^72\) Article 21.3(c) of the DSU.

\(^73\) See discussion in section IV.3(a) of this chapter. In private international commercial arbitration, as well, extra time must be factored in for cross-border enforcement and execution of awards. However, in the shadow of the law (particularly the New York Convention), awards are generally voluntarily complied with, probably quite quickly in most cases.
(b) Disputes where both parties want stricter confidentiality

(i) Confidentiality in standard dispute settlement proceedings

In contrast to the practice before a number of international tribunals,\textsuperscript{74} WTO dispute settlement proceedings are not open to the public, and also entail additional confidentiality obligations. Confidentiality is applicable through all stages of a dispute (from consultations to retaliation) and covers written submissions to the panel or the Appellate Body,\textsuperscript{75} oral hearings, the case record, the deliberations of the panel or the Appellate Body, and any communications with secretariat officials assigned to the case.\textsuperscript{76} The duty to maintain confidentiality extends to all panelists or Appellate Body members,\textsuperscript{77} WTO Secretariat officials,\textsuperscript{78} as well as to all governments that are parties to a dispute including delegation members and external advisors.\textsuperscript{79}

Beyond such 'standard' confidentiality, WTO dispute settlement provisions refer to information specifically designated as 'confidential' by the Member submitting such information. The DSU enjoins WTO Members and panels to treat such information as 'confidential'.\textsuperscript{80} A panel has clarified this to mean that parties and third parties have the responsibility to ensure that no member of their delegation (which would presumably also include legal advisors) shall disclose to any person outside the delegation any information designated as 'confidential'.\textsuperscript{81}

In contrast, the DSU does not provide specific procedures for protecting business-confidential information (BCI).\textsuperscript{82} As a result, WTO dispute settlement practice has over the past ten years repeatedly seen individual parties request panels to make use of their discretion to adopt ad hoc case-specific special procedures for protecting BCI. In response, panels have on some occasions made use of their discretion under Article 12 of the DSU to adopt such special procedures.\textsuperscript{83} The special procedures so adopted have included, for instance, the requirement that only 'approved persons may have access to BCI submitted',\textsuperscript{84} that the panel not disclose BCI in its report, that electronic copies be avoided, that BCI be stored in separate designated locations and be returned or destroyed after panel proceedings.\textsuperscript{85} Procedures for protecting BCI have been adopted not only in panel proceedings, but also in arbitration proceedings pursuant to Article 22.6 of the DSU.\textsuperscript{86} For its part, the Appellate Body has at times refused to adopt case-specific special rules governing the treatment of BCI on the grounds that the existing confidentiality requirements provide sufficient guarantees to safeguard the integrity of such information.\textsuperscript{87}

(ii) Shortcomings and gaps in confidentiality in standard dispute settlement proceedings

Despite its seemingly comprehensive nature, confidentiality in WTO dispute settlement suffers from a number of significant limitations. 'Standard' confidentiality is limited in that, for example, panel or use of proprietary information, but rather centred on 'relatively simple and clear breaches of international obligations'. (Olivier Prost, 'Confidentiality Under The DSU', in Bruce Wilson and Rufus Yerxa (eds), Key Issues in WTO Dispute Settlement - The First Ten Years (Cambridge, 2005), p. 194.)\textsuperscript{88}

The panels in Korea - Commercial Vessels (Panel Report, para. 1.15), Australia - Automotive Leather II (Article 21.5 - US) (Panel Report, paras. 3.2 - 3.6), Australia - Automotive Leather II (Panel Report, para. 4.1), Canada - Aircraft (Panel Report, paras. 9.54 - 9.69) Egypt - Relbar, US Wheat Gluten, and Brazil - Aircraft (Panel Report, para. 1.10) adopted such special procedures.\textsuperscript{89} These approved or designated persons may also have to sign specific Declarations of Non-Disclosure.\textsuperscript{90}

Despite, for instance, the Procedures for the Protection of Business Confidential Information adopted by the panel in Korea - Commercial Vessels (Panel Report, Attachment 2, pp. 167 ff).\textsuperscript{91}

Decision by the Arbitrators, EC - Bananas III (US) (Article 22.6 - EC), paras. 2.1 ff. In some Article 22.6 arbitrations, two versions of the award were prepared, one issued to the parties and containing confidential data, another not containing such data and circulated to the entire membership as well as the public. (See Decision of the Arbitrators, Canada - Aircraft Credits and Guarantees (Article 22.6 - Canada), Decision of the Arbitrators, Brazil - Aircraft (Article 22.6 - Brazil) and Award of the Arbitrators, US - Section 110(5)) Copyright Act (Article 25), paras. 1.22 - 1.24).\textsuperscript{92}

According to Prost, this is because DSU provisions were drafted at a time when the experience with the dispute settlement system related mainly to disputes that did not involve the...
Appellate Body reports are eventually circulated to all WTO Members and the public. As a result, the protection of information and arguments made by parties in written and oral submissions is only temporary, as the reports provide a summary of the parties' arguments and sometimes even the full text of the written submissions (at the panel stage).

Often this information is made available to WTO Members and the public, even before the reports have been finalized, through 'leaks' by Member governments of interim panel reports or confidential advance copies of the final report. The disregard for the confidentiality rule with respect to interim reports has escalated in recent years. In one case, government officials of the 'winning' party organized a press conference to publicly discuss the findings in an interim panel report, and in another a NGO released on the internet the full copy of the interim panel report in the still-ongoing 'GMO' (genetically modified organisms) dispute a few weeks after its release to the parties. Other more limited examples of breaches of 'standard' confidentiality have occurred in practice, but they do not appear to be as widespread or systematic. While the authors are not aware that there have been breaches of confidentiality with respect to information designated as confidential pursuant to Article 18.2 of the DSU, similar risks no doubt exist.

With respect to BCI, the text of the DSU as well as practice of the past ten years does not offer parties security that their BCI will be protected. As noted above, beyond generic references to 'confidential' information, the DSU does not contain any specific provisions or particular procedures to effectively safeguard BCI. Consequently, it has been for the parties in disputes to request the panels to use their discretion under Article 12 of the DSU to adopt special procedures for BCI protection. The problem that these parties have confronted, however, is that while a number of panels have accepted requests by parties for special procedures for the protection of BCI, other panels have rejected such requests or instead adopted special procedures that were less far-reaching than those requested by the parties.

While panels have been more inclined to adopt such special procedures for protecting BCI where both parties to the dispute agreed on special procedures, case law indicates that agreement between parties is not dispositive in this respect. At least some panels have felt entitled to modify special procedures for BCI protection even when they were agreed upon and proposed by both parties. At times, panels have modified such proposed procedures out of concern for third-party rights or against one party's objections. At other times, express objections by third parties did not deter panels from adopting the parties' proposed special procedures for the protection of BCI. Such case law underlines the discretionary nature of the adoption of special procedures for the protection of BCI. Even admitting that the specific facts of each case may compel different results, practice with respect to protecting BCI does not always appear to reflect a transparent, coherent, coordinated, and predictable approach by panels.

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88 In panel proceedings, parties to the dispute receive an advance confidential copy of the report several weeks before the circulation of the report; in proceedings before the Appellate Body, parties are sometimes given an advance copy, too, but only a few hours before the official circulation of the report.

89 Where submissions contain information specifically designated as 'confidential', Article 18.2 obliges parties to a dispute to provide, upon request of a Member, a non-confidential summary of the information contained in its written submission that could be disclosed to the public.

90 See, for instance, the US - Gambling dispute, in which the panel stated that the conduct of both Antigua & Barbuda and the United States was inappropriate and violated the confidentiality requirement (Panel Report, US - Gambling, paras. 5.3-5.13).

91 Typically, the leaking government will be the winning party and the key factor motivating such practice is most likely the desire to announce victory to the domestic constituencies as soon as possible. The effect of the practice is arguably to put pressure on the defending party to terminate its measure sooner rather than later; in addition, a somewhat more nefarious effect from the judicial perspective is to put pressure on the panelists so as to raise the barrier for modifying their report in the course of the interim review process.

92 See Appellate Body Report, Thailand - H-Beans, paras. 62-78. See also Panel Reports, EC - Export Subsidies on Sugar, paras. 7.36-7.99, with respect to certain proprietary information on cost of production of sugar.

93 See, for instance, Panel Report, Canada - Aircraft, para. 4.171; Panel Report, Australia - Leather II, para. 4.1; and Panel Report, Australia - Leather II (Article 21.5 - US), para. 3.2.

94 For instance, in Canada - Wheat Exports and Grain Imports, where the panel did not adopt the procedures proposed by Canada and not objected to by the United States. The panel was concerned that the proposed procedures did not sufficiently take into account third-party interests and, therefore, adopted a modified version of the proposed procedures (Panel Report, Canada - Wheat Exports and Grain Imports, para. 6.8, sub-paras. 11-14).

95 See also Decision of the Arbitrators, EC - Bananas III (Article 22.6 - EC), paras. 2.1 ff; and Prost, 'Confidentiality Under the DSU', p. 197.

96 Panel Report, Australia - Leather II (Article 21.5 - US), paras. 3.4-3.6.

97 See also Prost, 'Confidentiality Issues Under the DSU', p. 197. In addition to concerns about safeguarding the confidentiality of data, a party may face an additional problem; under the existing case law, even if a panel cannot oblige a party to provide confidential information, confidentiality concerns do not provide a justification for the refusal by a party to provide panels with requested information and panels have the discretion to draw adverse factual inferences from such a refusal (Panel Report, Indonesia - Autos, para. 14.235; Appellate Body Report, Canada - Aircraft, para. 198).
As a final important weakness, the WTO system offers virtually no mechanism to ensure that breaches of confidentiality are effectively sanctioned. WTO practice shows that breaches of confidentiality bear few consequences besides occasional (indirect) reprimanding statements by a panel. More tangible and credible sanctions, such as might be available in a domestic legal system, simply do not exist.99

In the light of the above discussion, it is obvious that confidentiality under standard dispute settlement procedures in the WTO is not particularly well guaranteed and that businesses have only limited certainty as to how WTO adjudicatory bodies may treat BCI in a particular dispute. The protection of confidential information may, however, be of considerable practical importance as it may directly affect the willingness of private enterprises to participate in WTO dispute settlement proceedings.

For these reasons, WTO Members may be interested in ensuring a greater degree of confidentiality. For instance, parties might wish to avoid leaks that currently occur under standard WTO procedures. Moreover, parties might wish to engage in proceedings in which they have greater latitude in designing rules for the protection of BCI and ensuring those rules are applied. Finally, parties might also, in exceptional cases, wish to keep the contents of a report itself confidential.

(iii) Does arbitration offer a solution?

Arbitration under Article 25 of the DSU or sui generis arbitration could make it easier for parties to have predictable and higher levels for protection of BCI. By having recourse to arbitration rather than to standard dispute settlement procedures, WTO Members would gain complete control over the formulation of the rules governing the protection of BCI thereby eliminating the uncertainty of how precisely a panel would treat

99 Thus, for instance, legal action by a private company that supplied confidential information (initially to its government that it provided in turn provided information to the panel) against another government that allegedly ‘leaked’ that information to a competitor would have to occur before a municipal court and would most likely have only very limited chances of success. (See also Prost, ‘Confidentiality Issues Under the DSU’, p. 199.) Moreover, sometimes the competitor may be sitting on the opposing WTO government’s delegation. For instance, the delegation of Indonesia in the Korea – Certain Paper dispute included individuals from the Indonesian paper industry. Despite Korea’s misgivings, the panel did not find the participation of those individuals in the Indonesian delegation to be objectionable, in particular since Korea had not requested the adoption of special procedures to protect any potentially business-confidential information (Panel Report, Korea – Certain Paper, paras. 7.10–7.18).

BCI in a given case. Furthermore, recourse to arbitration and the concomitant greater procedural autonomy would enable the parties to exclude the participation of third parties, thereby eliminating an element that has in the past swayed at least some panels away from special BCI procedures. Of course, it may still be necessary for an arbitrator to decide a disagreement relating to confidentiality issues that may arise in the course of the proceedings. However, it is unlikely that parties would not have a firm agreement on confidentiality issues prior to the initiation of arbitral proceedings, in particular if confidentiality were a motivating factor to have recourse to arbitration in the first place.

Regarding breaches of ‘standard’ confidentiality, Article 25 or sui generis arbitration may not resolve all the current problems in standard dispute settlement proceedings. So far, ‘standard’ confidentiality breaches have occurred on the side of governments and the observance of ‘standard’ confidentiality in arbitrations would also largely depend on the good will of governments. That said, the freedom for parties to an arbitration to craft precise procedural rules makes it possible to exclude some of those elements of standard dispute settlement procedures that arguably encourage leaking – for instance, the issuance of interim reports or providing advance copies of the final report to parties.100

A question arises regarding the extent to which arbitration proceedings might permit parties to keep confidential an entire arbitral award. Arguably Article 25 arbitration would not allow for this as the award itself has to be ‘notified’ to the DSB and to the council or committee of any relevant agreement. As other WTO Members may raise any point relating to the award, this implies that the contents of the award must be made known to them. In contrast, in sui generis arbitration proceedings, the parties would appear to have the freedom to keep the entire arbitral award secret – or, alternatively, to only announce the result to WTO Members, but not the entire text of the award.

The extent to which WTO Members would desire to keep confidential entire awards is of course debatable. A number of Members are advocates of greater transparency in standard WTO dispute settlement procedures,

100 The flexibility of arbitration proceedings may permit the creation of sui generis confidentiality safeguards. For instance, it is conceivable that members of a delegation be made subject to civil liability rules of a particular legal order (for instance, that of Switzerland as the WTO’s host country) for purposes of specific arbitration proceedings. Alternatively, a form of security could be envisaged (for instance, in the form of a bond posted by the parties to the arbitration) that would be forfeited in case of a breach of confidentiality. (The authors are indebted to Todd Friedbacher for this thought.)
thus keeping an entire award confidential would be incongruent with their stated policies. Even transparency-averse WTO Members may not wish to keep entire arbitration awards confidential, given that victory in an inter-governmental dispute is useful not only as a legal ‘judgment’ in and of itself, but also because it generates political pressure on the losing party, in particular in a multilateral forum. Such a judgment will provide significant political incentives for the losing government to bring itself into compliance so as to maintain its international credentials as a law-abiding member of the legal community, and/or to overcome problematic vested interests at home. Keeping the contents of a judgment or award confidential undoubtedly detracts from these effects. In addition, secrecy about the contents of an arbitral award may raise public suspicion about the legitimacy of the complaining government’s claims and further detract from the political and diplomatic usefulness of the award.

(c) Disputes for which the DSU does not have jurisdiction
It is possible that *sui generis* arbitration could be used to resolve disputes that are otherwise not directly enforceable under the DSU, such as disputes over compliance with the terms and conditions to waivers or MAS. The precedent for such an approach is the experience with the Banana Tariff Arbitrations, which resolved a dispute regarding compliance with conditions to a waiver.

Article 1.1 of the DSU provides that DSU procedures can only be used to resolve disputes brought pursuant to the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement), the DSU, as well as the multilateral and plurilateral trade agreements listed in Appendix 1 to the DSU (collectively, the ‘covered agreements’). Article 7.1 of the DSU further limits a panel’s terms of reference to the examination of a matter referred to it in the light of the provisions of the ‘covered agreements’ cited by the parties.

Waivers and MAS are not defined as ‘covered agreements’ in Appendix 1 to the DSU and therefore any dispute over compliance with their terms and conditions cannot be the source of a claim in a proceeding under the DSU. Consequently, where a Member has granted a waiver or MAS on certain terms and conditions and considers that they have not been satisfied by the other Member, it cannot seek an answer on that question directly under the DSU. Members could do so indirectly by re-litigating the issue from the beginning, arguing violation of a provision of the covered agreements that cannot be justified by the waiver or MAS (because its conditions have not been met). This indirect approach, however, would result in considerable delays before Members would have a ruling on the question of whether the conditions have, or have not, been met.

This next section briefly analyzes some of the advantages and disadvantages of *sui generis* arbitration as an alternative to litigation under the DSU as a means to resolving disputes over the compliance with conditions to agreements that are not ‘covered agreements’.

(i) Conditions to waivers
Article IX of the WTO Agreement confers on the Ministerial Conference the right to accord waivers releasing Members from their legal obligations under the WTO Agreement and the multilateral trade agreements annexed to it. Waivers provide a legal defence to claims of violation of those covered agreements.

Waivers often specify terms and conditions that the Member to whom the waiver is granted must fulfil. If a Member acts inconsistently with those terms and conditions, it can no longer invoke the waiver as a defence. The problem that arises is that occasionally there may be a genuine disagreement as to whether a Member has met the terms and conditions of a waiver, and therefore whether the Member can continue to invoke it as a defence or not.

In these situations, *sui generis* arbitration could be used as means of resolving the dispute. It offers the advantage that it can provide a legal decision on the issue in a short period of time. The Banana Tariff Arbitrations were completed in four months and one month, respectively. The alternative, re-litigating the entire issue under the DSU by claiming violation of a provision of the covered agreements that cannot be justified by the waiver (as its conditions have not been met), would require consultations, panel, and potentially Appellate Body proceedings, before Members would have a ruling. This process would entail delays of approximately 16 months, more if appealed.

The advantage of the speed of an arbitral ruling on such a dispute will largely depend on whether the Member found to be acting inconsistently with the conditions of a waiver is willing to alter its behaviour. If not, as *sui generis* arbitration cannot be enforced using existing DSU enforcement mechanisms, the only way a Member could enforce the failure of a Member to comply with the conditions of a waiver would be to re-litigate the entire proceeding. Therefore, in situations where the other

101 See section IV.3(a) of this chapter.
Member is not willing to alter its behaviour, *sui generis* arbitration could have the disadvantage of delaying the commencement of the re-litigation of the issue in the DSU.

The Banana Tariff Arbitrations, both of which were included in the Doha Waiver as a mechanism to determine whether the conditions of the waiver were fulfilled, provides an illustration of the advantage of a rapid decision, and the potential disadvantage of the lack of an immediate remedy were the European Communities to fail to alter its behaviour to comply with the conditions of the waiver.  

**(ii) Mutually agreed solutions**

MAS are case-specific agreements concluded when parties settle a dispute without a formal panel and/or Appellate Body ruling. Settlement occurs rather frequently in WTO dispute settlement, no doubt reflecting the complex inter-state and economic interests involved and, perhaps, still its origins in less 'legalized' dispute resolution processes. It would appear that about one third of all cases are settled, typically at the consultation stage and, occasionally, after a panel has been established. A portion of those settlements result in MAS that are officially notified to the DSU. By the authors' count, as of April 2006, 34 MAS—comprising 51 formally distinct disputes—that is, 15 per cent of all WTO disputes since 1995—have been formally notified to the DSU. This number renders MAS an important part of dispute settlement practice.

Accordingly, some of the Interested Parties in the Banana Tariff Arbitrations have initiated proceedings under the normal dispute settlement procedures of the DSU in order to gain an enforceable ruling from the DSU.

**Daves, WTO: The First Ten Years**, 48. It may be noted that not all non-settled cases result in a panel or Appellate Body ruling; it appears that some 25 per cent of the cases are simply dropped by the complainant or remain pending for extended periods of time until the panel lapses pursuant to Article 12.12 of the DSU (45-46).

There is concern about terms of settlements that have not been officially notified a circumstance which has given rise to some concern in the DSU review and has prompted calls for better disciplines in this respect. The underlying concern is that the precise conditions of settlement may be WTO-inconsistent in that they ignore rights of WTO Members not parties to the dispute and/or that, without the benefit of transparency, stronger WTO Members could force inequitable terms of settlement on smaller and less powerful parties.

**Arbitration as an Alternative to Litigation**

MAS notified to the DSU illustrate, in varying degrees of detail, that parties often include terms and conditions as part of their settlement agreement. For instance, MAS may contain a precise description of the action to be taken by the defendant country, a reference to the national regulatory or legislative measure that has already been promulgated, or that brings about or reflects the MAS, the text of a memorandum of understanding, or simply an announcement, without further details, of the type of action that will be or has been taken.

Despite the DSU's express preference for settling disputes through mutual agreement rather than litigation, the DSU sets forth only rudimentary procedures dealing with MAS. With Article 3.6 of the DSU providing that MAS to matters formally raised under the DSU shall be notified to the DSU and the relevant councils and committees, where any Member may raise any point relating thereto. Critically, the DSU does not provide for a procedural avenue for the complaining party to argue, at a later stage, that the terms and conditions of the MAS are not being respected by the responding party, and to obtain a ruling by a WTO adjudicator body on that issue.

Compounding the absence of a clearly designated procedure for resolving disputes over compliance with the terms and conditions of MAS, very little has been said to date by the panels or the Appellate Body about the precise legal nature and import of MAS. The only existing authoritative statement on MAS is found in the panel report in *India—Autos*, which opined that an MAS is not a 'covered agreement' within the meaning of Article 1.1 of the DSU. As is the case for waivers, therefore,

Slovak Republic—Sugar (DS255/2); Belgium—Rice (DS210/6); Romania—Minimum Import Prices (DS198/2); Brazil—Patent Protection (DS198/4); EC—Bananas III (DS271/8); Denmark—IPR Enforcement (DS83/2); EC—Motion Pictures (DS124A/2); Greece—Motion Pictures (DS 125/2); Australia—Salmonids (DS21/10); US—Textiles and Apparel II (DS151/10); Australia—Automotive Leather II (DS126/11); Argentina—Cotton (DS190/2); EC—Butter (DS72/7); India—Quantitative Restrictions (DS93/18 and DS90/2, DS91/2, DS92/2, DS93/2, DS94/2, DS96/2); Sweden—IPR Enforcement (DS86/2); Philippines—Pork and Poultry (DS74/5); US—Textiles and Apparel I (DS85/9); Turkey—Taxes on Film Revenues (DS63/3); Japan—Sound Recordings (DS28/4); Poland—Autos (DS19/2); EC—Scales (DS71/12) (Canada) (DS121/12, DS14/11 (Peru and Chile)); Japan—Quotas on Laver, W/T/DS323/5.

**Japan—Apples, W/T/DS245/21.**

**China—Ipr on Circuits, W/T/DS09/8.**

**Egypt—Matches, W/T/DS327/3,** stating that price undertakings will be concluded.

Article 3.7 of the DSU. See Panel Report, India—Autos, para. 7.114.

**Ibid., para. 7.118.** The only possible argument to the contrary is that MAS are provided for in the text of the DSU and, that, therefore, MAS emanate from the DSU, which is, of course, itself a covered agreement. This argument, however, appears rather strained and is highly unlikely to be accepted by a WTO panel or the Appellate Body.
the problem that Members are confronted with is that a claim alleging non-compliance with the terms and conditions of an MAS does not fall within the scope of disputes that can be brought under the DSU.

Hence, there is a gap in the DSU when a WTO Member wishes to obtain a ruling that another Member is not complying with the terms and conditions of a MAS. Filling this gap would require an amendment to the text of the DSU, such as that proposed by the European Communities, according to which proceedings under Article 21.5 of the DSU would be ‘opened up’ for claims based on MAS.113

As an alternative, one can also envisage sui generis arbitration as a possible option for resolving disputes over compliance with the terms and conditions of a MAS.114 Such an approach would mirror the use of sui generis arbitration to resolve disputes regarding conditions to waivers. The advantage would be decisions in a short period of time. The disadvantage would, however, remain that the awards could not be enforced using the DSU enforcement mechanisms where a Member nonetheless fails to alter its behaviour following the arbitration award.

Nevertheless, in practice, Members may not always wish to resolve disagreements over MAS through recourse to arbitration or other legalistic means. Members have arguably so far perceived MAS as more political, rather than legal, instruments - a view that is arguably also supported by the observation that not all MAS are notified to the DSB. Where this is the case, Members may not wish to have recourse to third-party binding adjudication in resolving disputes over MAS.

Even assuming that WTO Members will, in the future, litigate more over questions relating to MAS, sui generis arbitration will not always suit situations where the complaining party wishes to challenge another Member’s implementation measure. This is because the Member may not want to limit its arguments exclusively with reference to the MAS. Rather, the complaining party may want to challenge the implementing measure under any provision of any of the covered agreements.115 Of course, Members may stipulate, in the terms of reference of a sui generis arbitration, that the implementing measure be examined not only under the terms of the MAS, but also under any cited provision of WTO law.116

(d) Political dimensions of WTO litigation

Among factors that may constitute incentives or disincentives for using arbitration proceedings in the WTO context, it is important to keep in mind the political dimension and the concomitant idiosyncrasies of WTO dispute settlement. As is well known, international trade disputes often reflect internal conflicts between interest groups in the defending state. The trade restrictive measures at issue may have been initially adopted by a government unable to resist protectionist pressures from powerful constituencies. A judgment from the WTO that such measures are WTO-inconsistent will strengthen the hand of the defendant government, as well as that of domestic constituencies with opposing commercial interests, in the domestic conflict in the defendant state. Where the relevant protectionist domestic interests are well-entrenched, a settlement at the consultations stage may simply be unacceptable within the domestic political context and will not generate sufficient pressure to overcome the resistance of the interest group at issue. What is ‘needed’ is a full-blown loss in a WTO dispute settlement proceeding.

How could circumstances such as these affect the potential of arbitration as an alternative to litigation in the WTO context? Some might argue that pursuing a WTO dispute, not through the ‘standard’ DSU litigation procedures, but rather through arbitration, may lead to a perception that the resulting decision is somehow of lesser value than a panel and Appellate Body report. A losing defendant government may be concerned about being accused domestically as not having exhausted all possible lines of defence available under the DSU and that by agreeing to expedited, more flexible procedures, it ‘sold out’ the relevant domestic

113 Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, Communication from the European Communities, TN/DS/W/1, 13 March 2002, p. 7. In this context, it should of course be avoided that a DSU procedure be used to verify compliance with an MAS that is inconsistent with WTO agreements. At least some MAS notified to the DSB do not appear to be consistent with some WTO provisions, for instance provisions relating to the prohibition of quotas or the MFN principle (for example, in cases where the parties agreed that exports from the complaining party would enter the market of the defending party on the basis of a preferential quota, opened exclusively for suppliers from the complaining party).

114 The use of an MAS in a WTO adjudicatory process will more likely arise along the lines of the dispute in India – Autism – namely, that a defending party will rely on the MAS as a procedural bar to claims raised by the complaining party or, at least, as part of the applicable law in assessing those claims.

115 For instance, this could occur when a measure allegedly taken pursuant to an MAS goes beyond the scope of the MAS and or extends into areas that go beyond the original dispute. For instance, the defending party could remove a sanitary and phytosanitary (SPS) market-access barrier on a specific product by implementing a new quarantine procedure applicable to a wide range of products.

116 However, if that is the case, then that part of the dispute could also be decided under normal panel or Appellate Body proceedings under the DSU.
interest group. As a result, in cases where a domestic protectionist interest group is particularly powerful, an arbitral award may not have the same useful political effect as a ‘standard’ panel and Appellate Body report in forcing the protectionist interest group to back down.

On the other hand, experience with the *sui generis* Banana Tariff Arbitrations has been positive. There has been no suggestion by either the European Communities or the specific interest groups at issue in that dispute, that the two unfavourable arbitral awards were not taken seriously by virtue of their *sui generis* character as they didn’t result from ‘standard’ DSU litigation proceedings. Hence, the political dimension of the decision whether to have recourse to arbitration procedures will most likely have to be assessed on a case-by-case basis. Some disputes will, by virtue of their domestic political contentiousness, lend themselves to arbitration better than others. Who is selected as arbitrator for such WTO arbitrations should also be of relevance. Less concerns are likely to arise, especially at this current phase when all concerned are getting used to these processes, if arbitrators are experienced panelists or indeed (as in the Banana Tariff Arbitrations) members of the Appellate Body itself.

3. Considerations when structuring arbitrations in the WTO

(a) Ensure that the decision is enforceable

Parties deciding to have recourse to arbitration in the WTO should consider whether they wish to make the resulting arbitral award enforceable through the existing DSU enforcement mechanisms. Arbitral awards pursuant to Article 25 of the DSU are expressly enforceable through those mechanisms, with Article 25.4 explicitly providing that Articles 21 and 22 of the DSU apply *mutatis mutandis* to Article 25 arbitration awards. *Sui generis* arbitration awards, in contrast, are unlikely to be enforceable through Articles 21 and 22 of the DSU.117

Enforceability would typically be a key concern in private commercial or investor-State arbitration, but need not necessarily be so in the WTO context. It is true that an attractive element of WTO dispute settlement is its enforcement mechanism. At the same time, however, WTO dispute settlement, whether in the ‘standard’ panel and Appellate Body procedures or arbitration procedures, remains a mixed politico-legal exercise. Compliance with an adverse ruling is often a decision heavily influenced by political considerations and not necessarily exclusively determined by the existence of a formal sanctioning mechanism (suspension of concessions). As a result, where political pressure for compliance (both international and domestic) resulting from an adverse arbitral award is strong, a *sui generis* arbitration award may not be good for a chance of being complied with as any panel or Appellate Body report, even in the absence of a formal enforcement mechanism.

(b) Ensure qualified arbitrators and secretariat support

Qualified arbitrators are essential for successful arbitration proceedings. In the private commercial arbitration context, it has been said that

[the choice of the persons who compose the arbitral tribunal is vital and often the most decisive step in the arbitration. It has rightly been said that arbitration is only as good as the arbitrators.118

The success of arbitration in the WTO will also largely depend upon the arbitrators selected and the support they are offered. In selecting arbitrators in the WTO context, parties may therefore wish to appoint individuals well versed in the substance of WTO law, such as previous panelists, Appellate Body members or government officials and academics with demonstrated expertise. Certainly the experience in the Copyright Arbitration (where the arbitrators were chaired by the chair of the panel in the original dispute) and the Banana Tariff Arbitration (where the arbitrators were two sitting Appellate Body members as well as a former Canadian Ambassador to the WTO), illustrates that arbitrators experienced in WTO law can be effective.

At the same time, given that parties often have recourse to arbitration proceedings precisely in order to avoid inconveniences or pitfalls associated with standard WTO dispute settlement procedures, they might also consider appointing arbitration specialists who are not necessarily experts in WTO law. These individuals would have the skills to conduct expedited proceedings that make full use of the advantages arbitration offers over standard litigation procedures, without being burdened by preconceived notions of WTO dispute settlement practice.

117 While it is conceivable that a *sui generis* arbitration agreement might contain a clause reserving the right for the complaining party to have recourse to Articles 21 and 22 of the DSU, it is far from clear to what extent WTO Members would accept and allow for such practice.

With respect to legal and administrative support for arbitrators, experience in WTO dispute settlement litigation suggests that qualified secretariat support from WTO staff is essential for the functioning of panels and Appellate Body proceedings. The arbitrators in the Banana Tariff Arbitrations were also assisted by a team of WTO Secretariat staff from an unprecedented four WTO divisions, which assisted them to complete their tasks within the tight timeframes of those arbitrations.

Members considering arbitration in the WTO context therefore ought to take into account the need to ensure qualified legal and administrative support. As mentioned, there may be benefits in this support being provided by the WTO Secretariat. Nonetheless, support could also be provided by individuals not affiliated with the WTO Secretariat. While the DSU requires support by the WTO Secretariat to panels (Article 27.1 of the DSU) and the Appellate Body (Article 17.7 of the DSU), it does not do so with respect to arbitration under Article 25 of the DSU. This is all the more true for sui generis arbitration. Of course, more often than not, parties may be interested in providing arbitrators with the support of the WTO Secretariat in the light of its expertise and reputation for impartiality. However, should parties to the arbitration wish to provide for ‘outside’ secretariat support, they would be free to do so. In addition, arguably, the Director-General of the WTO is under no legal obligation to provide WTO Secretariat support for arbitration (certainly not for sui generis arbitration), or to give such arbitration proceedings the same priority as that given to standard dispute settlement procedures (even if the political reality may dictate otherwise). As a consequence, in times of high standard dispute settlement activity and low availability of WTO Secretariat resources, parties to the arbitration may be pushed towards using at least partially outside secretariat support for the arbitrators in order not to delay the proceedings.

(c) Ensure certainty with respect to the involvement of third parties

Article 25.3 of the DSU provides that arbitration pursuant to Article 25 will not include third parties unless there is explicit agreement by the main parties to the arbitration permitting their participation. Sui generis arbitration has no pre-determined procedures regarding third-party participation and, therefore, Members resorting to sui generis arbitration should develop those procedures in advance if they want to ensure certainty with respect to third-party involvement in the proceedings.

In the absence of procedures developed in advance, the involvement of third parties may be left to the discretion of the arbitrators. This occurred in the Banana Tariff Arbitrations where the arbitral tribunal accepted the request of 14 ACP countries to participate, in a limited manner, in the arbitration. In a letter explaining its decision, the arbitral tribunal noted that the Doha Waiver Annex provides ‘no rule precluding participation by such Members’, and therefore that the Doha Waiver Annex ‘leaves it to the Arbitrator’s discretion to organize and manage the conduct of the proceedings’. Nonetheless, the arbitral tribunal limited the participation of the relevant ACP countries to making one collective written submission and a single brief statement at the hearing so that their participation affected neither the timetable of the proceedings nor the time-frame for the conclusion of the arbitration as foreseen in the Doha Waiver.

(d) Develop procedures in advance

The experience in the bananas tariff arbitration with respect to third-party involvement illustrates that, unless parties develop procedures for the arbitration in advance, they will be vulnerable to the arbitrator’s discretionary decisions regarding the procedures governing the arbitration.

A similar situation occurred in the Copyright Arbitration where the parties had not agreed to procedures in advance concerning the treatment of BCI. Consequently, the arbitrators decided that they would use their discretion and ‘rely on the practice of the Appellate Body’ which included permitting the arbitrators to make their own determination as to which information would be kept confidential in the final award, according to the criteria ‘that confidentiality for business reasons was sufficiently warranted’. This can be contrasted with the arbitrators’ approach to the allocation of the burden of proof in that proceeding where the arbitrators followed the procedures agreed to in advance by the parties, noting that those procedures ‘expressly instruct us to follow the allocation of burden of proof rules applied in proceedings under Article 22.6’ of the DSU.

The difficulty with developing procedures in advance of arbitration, however, is the time involved and willingness of the parties to negotiate and agree to those procedures. In private international commercial arbitration, this difficulty is often averted by referring to default rules of arbitration that would be applicable in the absence of prior agreement such as:

119 Letter from the arbitrator to the parties, dated 18 May 2005.
120 Award of the Arbitrators, US – Section 110(5) Copyright Act (Article 25), para. 1.24.
121 Ibid., para. 4.4.
as the UN Commission on International Trade Law (UNCITRAL) Arbitration Rules. The other common method used in private international commercial arbitration to avoid giving arbitrators too much discretion to determine the procedures governing arbitration is to use institutional arbitration, such as those administered by the International Chamber of Commerce or the International Centre for the Settlement of Investment Disputes, which have predetermined procedural rules for the arbitration.

Members wishing to utilize arbitration as an alternative to litigation in the WTO may therefore benefit from developing in advance certain model default rules on arbitration, serving a similar function as UNICTRAL Arbitration Rules. These would operate in the absence of agreement by the parties on the applicable procedures. They would avoid the time and costs of parties negotiating in advance every procedural rule for WTO arbitration, as well as the risk of granting too much discretion to the arbitrators to determine the procedures to be followed where agreement is not possible. At the same time, parties would be free to deviate from those default rules thus retaining the flexibility to adjust arbitration procedures to achieve specific objectives.

V. Conclusion

A curiosity of WTO dispute settlement practice is the almost exclusive reliance on litigation at a time when domestic legal systems, and private parties in international commercial disputes, are increasingly questioning the litigation model. The length of time to resolve disputes through litigation, the costs involved, and the lack of flexibility has resulted in a trend towards using alternatives to litigation, including arbitration. This trend is particularly clear in the context of private international commercial disputes where arbitration has superseded litigation as the preferred means of dispute settlement.

In contrast, WTO Members have demonstrated a clear preference to litigate their disputes. In the first ten years of the WTO dispute settlement system, litigation has been initiated on over 300 occasions resulting in over 200 panel and Appellate Body reports. This caseload rivals over 80 years of litigation in the ICI (and its predecessor the Permanent Court of International Justice (PCIJ)) and is greater than that of 50 years of dispute resolution in the GATT. At the same time, litigation in the WTO suffers from many of the same limitations as litigation in domestic legal systems— including the time it takes to gain a final determination, the associated legal costs, and the lack of flexibility to develop procedures adapted to the specific circumstances of each dispute.

This chapter analyzes the potential of arbitration as an alternative to litigation in the WTO. It does so in the light of the recent successful Banana Tariff arbitrations, the first sui generis arbitrations to be held under the auspices of the WTO. These arbitrations examined issues of a substantive scope and complexity typical of panel and Appellate Body proceedings, and demonstrated that arbitration could operate as an effective alternative to litigation in a WTO context. A similar positive outcome was achieved in the Copyright Arbitration, the only other occasion that WTO Members consented to voluntary arbitration as a means to resolve a dispute in the WTO.

Professor Donald McRae has noted that in the WTO context, 'domestic law experience in forms of dispute resolution developed as an alternative or supplement to litigation needs careful consideration'. To that end, this chapter has examined the extent to which the conditions motivating the preference for arbitration over litigation in private international commercial disputes occur in the WTO context. Overall, the chapter concludes that the same conditions do not fully apply in the WTO context and therefore the potential of arbitration is likely to be limited to certain specific situations. Nonetheless, in those specific situations, arbitration could be of considerable value.

If arbitration were to be used more regularly as an alternative to litigation in the WTO it will be important to avoid it becoming over-formalized, slow, and just as expensive as regular litigation. For a period in the 1990s, this had occurred in private international commercial arbitration, and an awareness of those risks would be of value when developing procedures for future WTO arbitrations.

122 McRae, 'The Future of the WTO Dispute Settlement', 9.