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Information paper

WTO rules and animal welfare

Introduction

This paper addresses the complex and commonly misunderstood interplay between the rules of the World Trade Organisation (the WTO) and the laws of a country designed to address animal welfare concerns that restrict international trade. A common misconception is that such laws will inevitably contravene WTO rules. This is not the case.

As outlined in this paper, there are legal grounds under the WTO rules to justify measures that restrict international trade (both on imports and exports) on the basis of animal welfare concerns. In particular, WTO rules allow for the imposition of trade measures designed to protect public morals. The WTO Dispute Panel and Appellate Body have each concluded that the 'public morals exception' provides a sound legal basis for animal welfare trade-restricting measures. In fact, there are numerous examples of such measures already in existence in the EU, the US, and also Australia.

The key issue when considering the legality of such laws is the *manner* in which the measure is implemented. Adopting a cooperative approach to addressing the animal welfare concerns with the relevant trading partner through consultation, efforts to create bi/multinational agreements, and the provision of technical or financial assistance before the measure is imposed will strengthen the measure's justification.

Concerns regarding potential inconsistencies with WTO rules should not be used as an excuse to delay or reject national animal welfare law reforms. This is known as the 'regulatory chilling effect' and risks undermining Australia's national policies, values, and autonomy.

What is the WTO and GATT?

The WTO was established in 1995 under the Marrakech Agreement. Its primary function is to administer international trade agreements. It provides forums for negotiating and developing international agreements, and for the resolution of trade disputes through the Dispute Settlement Panel and Appellate Body. 159 countries are members of the WTO (member States).

The primary objective of the WTO is to liberalise international trade to facilitate world-wide economic development. The WTO seeks to do this through the reduction of trade barriers such as tariffs and other "technical" barriers (which can include labelling regulations).

The General Agreement on Tariffs and Trade (the GATT) was established in 1947 and is the primary international agreement governing the development and conduct of international trade in goods. There are separate international trade agreements that govern trade-related investment measures, the regulation of 'technical barriers' to trade, and the trade in services and intellectual property. Collectively, these agreements and others are referred to as 'WTO rules'.

The conflict between free trade and national autonomy

In performing its functions, the WTO must balance the interests of national autonomy with the objective of free and open international trade. The tension between these interests emerges when member States enact domestic regulations to progress national policies that have the effect of directly or indirectly restricting trade in products or services with other member States. Often this occurs in the areas of environmental protection, labour rights, and more recently, animal welfare.

For example, a member State may choose to reform its animal welfare laws to prohibit certain methods of farming which are detrimental to animal welfare. The consequences of such regulation may result in increasing the costs of production. Some of those costs may be passed on to the consumer through increases in the retail price of the product. However, when the consumer is presented with cheaper alternatives in the form of imported products that are not produced in accordance with the new domestic methods of production, they may preference the cheaper products[1] thereby undermining the animal welfare policy objectives behind the reforms. There is no 'net-benefit' to animal welfare as the animals in the importing countries are still subjected to the practices sought to be prohibited by the reforms, and domestic industries suffer a competitive disadvantage and lose market share. Accordingly, member States may seek to offset this dilemma by placing certain restrictions on the cheaper non-welfare friendly imports, or in some cases prohibiting their importation altogether. It is in these circumstances when a complaint may be made to the WTO Dispute Panel on the basis of an unlawful restraint of trade.

As the WTO's primary aim is trade liberalisation, it is often perceived to unduly prioritise free trade objectives to the detriment of national interests when it enacts new laws and determines trade disputes. This perception has contributed to causing what commentators refer to as the 'regulatory chilling effect', particularly in developed countries.

The regulatory chilling effect is a term used to describe a member State's decision not to regulate with respect to a particular area of environmental or social concern due to fears that such regulation may contravene WTO rules (see for instance Fitzgerald, 2011). The following outlines what those rules are.

What does GATT prohibit?

To facilitate the objective of free trade, Article XI of the GATT prohibits non-tariff, State-based restrictions on international trade. This prohibition applies equally to import and export practices. Article XI states that:

> [n]o prohibitions or restrictions…shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
>
> (Article XI, GATT 1947)

A State-enforced ban on the import or export of a particular product or good (including live animals) would therefore breach Article XI unless one of the exceptions in Article XX apply (Stevenson, 2002; Thomas, 2007). Similarly, a state-imposed export condition such as a requirement that exported cattle be stunned before slaughter could potentially breach Article XI.

[1] This is often as a result of market failure in the form of lack of information exchange between product and consumer. Method of production / animal welfare labelling regimes would facilitate the consumer's willingness to pay more for higher animal welfare products.

Whether such a measure is likely to breach Article XI would depend upon the practical impact the requirement would have on the trade. For instance, if the trade can continue with a requirement for stunning then the chances of such a requirement being found to breach Article XI are less likely, and the chances of a complaint being filed with the WTO in the first place are more remote. If, however, a requirement for stunning effectively prohibited a large proportion of the trade from continuing then it would be more likely for a complaint to be made and for the requirement to be found to be in contravention of Article XI.

Regulated labelling laws may also be subject to Article XI if the labelling laws affect the ability of imports to access and to be sold in the national market. Labelling laws can also be considered "technical barriers" to trade and are therefore also subject to the provisions of the Agreement on Technical Barriers to Trade (the TBT Agreement).

The other significant prohibitions in the GATT concern discriminatory conduct in international trade. These prohibitions are contained in Articles I and III of the GATT. As with ordinary anti-discrimination laws, the discrimination can be either direct or indirect in effect. The Dispute Panel will look to the practical operation of the measure, so even though a measure may appear to be neutral in form, it may nevertheless be found to be discriminatory if it disproportionately affects another member State's ability to engage in trade.

Article I is referred to as the Most-Favoured-Nation rule (MFN rule). The MFN rule requires all member States to treat their various foreign trading partners alike. It provides that:

> any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
>
> (Article I, GATT 1947)

If a member State provides for the duty-free importation of a given product from one of its trading partners, then that member State must permit duty-free importation of that product from all other member States seeking to engage in that trade. Likewise, if a member State was to prohibit or restrict the exportation of a particular product to one member State, it must do the same to all other member States.

Article III is referred to as the National Treatment rule. It requires the equal treatment of foreign and domestic goods. It states that:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
>
> (Article III, GATT 1947)

Article III is designed to prevent the use of domestic regulations or taxes to 'protect' or give a competitive advantage to, domestic products.

It is important to note that for Articles I and III to apply, the discriminatory treatment must be in relation to "like" products. In determining whether two products are alike, the Dispute Panel will look at the products' physical characteristics and end uses[2]. The process and production methods

[2] *United States-Restrictions on Imports of Tuna* (1991) at 5.15.

(or PPMs) for the products are not taken into account in assessing 'likeness' (Charnovitz, 2002). Therefore, if a member State was to treat a free-range egg differently from a battery-cage egg (by prohibiting the sale of the latter for instance), it would be considered discriminatory treatment of a "like" product (Stevenson, 2002).

Finally, it is important to remember that the GATT provisions only bind the State. They do not apply to the conduct of companies within member States. Accordingly, if Coles and Woolworths were to discontinue the importation of battery-cage eggs or sow-stall derived pork, this decision would not be subject to GATT provisions.

What are the exceptions to these prohibitions?

Article XX of the GATT provides for a number of exceptions to the above prohibitions on trade restrictions and discriminatory treatment. The exceptions relevant to animal welfare measures concern the protection of public morals and animal health. Article XX reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> a) Necessary to protect public morals;
> b) Necessary to protect human, animal or plant life or health.
>
> (Article XX, GATT 1947)

In practice, the public morals exception provides a stronger basis for justifying trade restrictions based on animal welfare concerns. This is because the animal health exception poses two difficulties.

First, there is uncertainty as to whether the term "animal health" would be interpreted broadly to include issues of animal welfare. The exception was originally intended to protect the health of a nation's animals from disease. While animal health is a fundamental component of animal welfare, the same cannot necessarily be said for the significance of animal welfare to animal health. It may be argued that animal welfare is an important component of animal health, but in order to rely on the exception, scientific evidence of its causal impact on animal health would be required, and such impact would need to be significant. Whether this evidence exists will of course depend largely on the specific circumstances of the particular animal welfare concern at issue. The World Organisation for Animal Health's (the OIE) expanded leadership on animal welfare, and its recognition of the connection between animal health and animal welfare is promising in this regard as the OIE is recognised by the WTO as an authority on animal health matters (Eaton, Bourgeois & Achterbosch, 2005). The OIE's work in this area has the potential to encourage a more expansive interpretation of the term "animal health" under Article XX.

However, there is a second difficulty for relying on the animal health exception. It concerns what commentators refer to as the requirement for a "jurisdictional nexus" between the animal, whose health is sought to be protected, and the member State's territorial boundaries (see, for example, Stevenson, 2002)[3]. In other words, Article XX(b) only applies to the health of animals residing within the trade-restricting member State's territory. A member State's interest in the health of animals residing in foreign jurisdictions, or for those which have been exported out of the country,

[3] *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (1998) at 133.

is not relevant for the purposes of Article XX(b) if the treatment of such animals has no impact upon the health of animals within the member State's territory.

The jurisdictional nexus requirement was implied by the Dispute Panel to prevent member States from being able to "unilaterally determine the [animal] life and health protection policies from which other contracting parties could not deviate"[4], or to otherwise regulate "extra-jurisdictionally" (Chanovitz, 1998). Unfortunately, as animal welfare trade measures are in most cases imposed because of concerns regarding poor animal welfare standards in foreign jurisdictions, the animal health exception may not provide a strong basis upon which to rely.

The public morals exception, however, does not pose the same difficulties. Public morals in this context are defined broadly as "those standards of right and wrong conduct maintained by or on behalf of a community or nation."[5] The Dispute Panel is expected to give considerable deference to the opinion of a member State in deciding what is a matter of public morals to that member State (Eaton, Bourgeois and Achterbosch, 2005; Nielsen, 2007; and Fitzgerald, 2011). Animal welfare is widely accepted as a matter that falls within the realm of public morals (see, for example, Charnovitz, 1998 and Thomas, 2007). This was confirmed in a recent Appellate Body decision concerning the legality of the European Union's decision to prohibit the importation and marketing of seal products[6] (discussed in further detail below).

The jurisdictional nexus requirement under this exception does not present the same problems as those considered above, as the object of protection (the public's morals) resides within the member State's jurisdictional boundaries. A public morals-protecting measure is directed towards protecting the member State's citizens from the moral offence caused by the member State's participation in, and therefore facilitation of, what the citizens consider to be an immoral trade. In this sense, the measure is deemed to be "inwardly-directed" as opposed to being "outwardly-directed" (Chanovitz, 1998). As Professor Erich Vranes (2009) has stated:

> [I]t has rightly been emphasized in academic writings that [animal welfare trade-restricting] regulations are not necessarily based on an intention to 'regulate' conduct occurring in another country: an [animal welfare] import prohibition by a given WTO Member may be motivated by the fact that the Member in question simply does not wish to have anything to do with the products stemming from certain problematic production processes.

Public morals-protecting measures may still have extra-jurisdictional effects through encouraging the exporting country to change its production methods, but these effects are incidental to the aim of protecting the member State's public morals. It follows, that when governments are developing trade-restricting laws or regulations, they should ensure that such measures are designed so as to address the protection of their citizen's morals, rather than the conduct in the foreign jurisdiction which offends those morals. It must be clear that the intended effect of the measure is 'inwardly-directed'. This approach should also be kept in mind when engaging in parliamentary debates regarding the development of the laws or regulations, and in the drafting of explanatory notes and other relevant extrinsic materials.

This jurisdictional analysis forms part of the broader crucial question the Dispute Panel will consider, that is: whether the measure is "necessary" to protect those morals. This analysis focuses on the means employed to achieve the aims of the measure. In determining what is "necessary", the

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4 *United States-Restrictions on Imports of Tuna* (1991) at 5.27.

5 *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005) at 296.

6 *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (2014).

Dispute Panel will engage in a process of weighing and balancing a series of factors by looking to the relative importance of the interests or values furthered by the measure, and the significance of the restriction on trade[7]. The Dispute Panel will then consider whether the measure contributes to the realisation of the ends it is pursuing[8].

In determining whether the measure is necessary, the Panel must also undertake a comparison of the challenged measure and possible alternatives put forward by the complaining party[9]. If the complaining party can point to another reasonably available, less trade-restrictive measure, the onus will be placed on the respondent party to prove otherwise[10].

Labelling requirements are generally viewed as one of the least trade-restrictive measures available to a member State in promoting its national policies. However, as with other measures, the particular labelling regime chosen must be the least trade-restrictive labelling regime available. This issue was recently explored in the long-running case of *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*. In this case, the Dispute Panel concluded that the US "Dolphin Safe" certification and labelling regime was inconsistent with Article 2.2 of the TBT Agreement because Mexico was successful in demonstrating that an equivalent labelling regime under *The Agreement on the International Dolphin Conservation Program* was capable of achieving the same ends (i.e. dolphin protection) with less trade-restricting effects.

In considering the necessity of the measure, the Dispute Panel will also place considerable emphasis on the extent to which the member State engaged in a course of cooperative consultation with the member State(s) affected by the measure, and the nature of any support (whether technical or financial) provided to those States to assist them in addressing the particular animal welfare concerns (Stevenson, 2002). In particular, Dispute Panels look positively upon attempts to create bi/multilateral agreements to address the animal welfare concerns before trade restricting measures are imposed. Conversely, measures enacted in a unilateral fashion are viewed negatively as they are seen as an attempt to impose domestic policies on another sovereign State.

Finally, the measure must also satisfy the preamble (or chapeau) to Article XX, which states that the measure cannot "constitute a means of arbitrary or unjustifiable discrimination". To some extent, this requirement re-introduces the prohibition on discriminatory treatment found in Articles I and III. Any trade restriction based on the Article XX exceptions must be applied in a consistent fashion to other trading member States and the domestic market.

Examples of animal welfare trade-restricting measures

There are a number of examples of trade-restricting measures that have been enacted to address animal welfare concerns and policy objectives of member States. In 1993, the European Union (EU) passed a regulation to prohibit the marketing of domestically produced and imported cosmetics that contain ingredients tested on animals by 2013[11]. Bans on the importation of dog and cat fur have also occurred in several countries. In 2000, the US enacted a measure to prohibit the importation of dog and cat fur[12], stating that “the trade in dog and cat fur is ethically and

7 *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005) at 305.
8 *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005) at 306.
9 *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005) at 307.
10 *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005) at 311.
11 Council Directive 76/768/EEC as amended by Council Directive 93/35/EC on the approximation of laws of the Members States relating to cosmetic products.
12 US Code, Title 19, Chapter 4, Subtitle II, Part I, s.1308 Prohibition on Importation of Dog and Cat Fur Products, and the *Dog and Cat Protection Act 2000*.

aesthetically abhorrent to United States citizens."[13] Australia followed suit in 2004 when it amended the *Customs (Prohibited Imports) Regulations 1956* to prohibit the importation of dog and cat fur[14]. The Explanatory Statement to the amendment provides some insight into the impetus for the ban:

> In response to representations from the Humane Society International, supported by a broad section of the Australian community, concerning the disturbing trade in the fur of cats and dogs, the Government has decided to control the importation into, and exportation from, Australia of cat and dog fur products…Many Australians believe that trade in dog and cat fur is unacceptable.[15]

The EU banned dog and cat fur in 2007 evidencing similar ethical concerns stating that "in the perception of EU citizens, cats and dogs are considered to be pet animals and therefore it is not acceptable to use their fur or products containing such fur."[16]

In 2004, California passed a law to ban the force-feeding of birds and the sale of foie gras derived from force feeding by 2012[17]. While California is not in itself a member State, its law is still subject to the GATT by virtue of the operation of Article XXIV:12, which requires member States to take measures to ensure observance of the provisions of the GATT by the regional and local governments within its territory.

Finally, in 2009 the EU passed a law to prohibit the sale and importation of seal products[18]. Further ethical sentiments were expressed in relation to the decision to enact this measure:

> The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.[19]

Canada challenged the validity of this measure under Articles I, III and XI of the GATT, filing a complaint with the WTO Dispute Panel. The EU rejected Canada's arguments and a Dispute Panel for hearing the complaint was established on 25 March 2011. The EU relied on the public morals exception under Article XX(a) of the GATT to justify the measure. On 25 November 2013 the Dispute Panel found that the EU's ban on the importation of seal products was necessary to protect the public morals of its citizens. The decision was appealed by Canada and the Appellate Body upheld the Dispute Panel's findings on these key points. This was the first time the public morals exception had been tested before the WTO dispute process in the context of defending an animal welfare trade-restricting measure. The Appellate Body decision is expected to have significant implications for way animal welfare is considered in international trade policy.

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13 Explanatory Notes to above.

14 Regulation 4W, *Customs (Prohibited Imports) Regulations 1956*.

15 Explanatory Statement, *Customs (Prohibited Imports) Amendment Regulations 2004*.

16 Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur.

17 California Health and Safety Code, Division 20, Chapter 13.4 Force Fed Birds.

18 Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products.

19 Ibid, par 4, Preamble.

The dispute settlement process

Only member States have standing to make complaints to the WTO. Complaints are relatively rare with only around 20 being made annually (see *Table 1* for a breakdown of complaints made by Australia's live animal trading partners). The reasons for filing a complaint and commencing a dispute settlement process will vary according to the specific circumstances of the dispute and the concerns of the member States involved. Commercial factors are of course a significant factor. In basic terms, the greater the economic loss caused by the trade measure imposed, the greater the chances of a complaint being made. But other relevant factors may include unique impacts upon specific communities or industries; the comparative time, resources, and expense required for engaging in the dispute; the potential precedential value of the case to the member State; and also, the perceived actions and attitude of the measure-imposing member State (for instance, whether they are seen to be attempting to impose their will over another member State or otherwise perceived to be acting in an arrogant fashion).

The WTO dispute settlement process is long and drawn-out and places a strong emphasis on consultation and negotiation. It is due to this focus on consultation that many of the complaints made to the WTO are resolved and settled before the matter proceeds to a Dispute Panel hearing. See *Attachment 1* for an overview of the dispute settlement process.

Table 1: WTO complaints filed by Middle Eastern and Asian live animal trading partners from 1996 - 2011[20]

Middle East complaints	
Bahrain	0
Egypt	0
Israel	0
Jordan	0
Kuwait	0
Libya	0
Oman	0
Qatar	0
Saudi Arabia	0
Turkey	2
UAE	0

Asia complaints	
Brunei	0
Indonesia	5
Japan	14
Malaysia	1
Philippines	5
Singapore	0

What are the consequences of contravening WTO rules?

The most common form of inconsistency with WTO rules in cases relating to Article XX exemptions concerns the manner in which the measure is implemented, rather than the legitimacy of the measure's purpose. In these situations, the Dispute Panel will provide a detailed ruling on how the measure contravenes the relevant WTO rule(s). The Dispute Panel does not, however, provide advice on how the contravention should be remedied. As there are many options available to a member State to remedy contraventions, it is left to the member State to determine how it will ensure conformity.

If the member State fails to remedy the contravention within a reasonable time, it is then expected to negotiate a compensation agreement with the aggrieved member State. If this agreement cannot

[20] WTO Annual Report 2011, available at: http://www.wto.org/english/res_e/publications_e/anrep11_e.htm

be reached the aggrieved member State may then take retaliatory action in the form of trade sanctions. These sanctions are generally expected to be imposed within the same trade sector as the dispute.

Conclusion

Any State-enforced trade measure, which directly or indirectly restricts or prohibits the importation or exportation of a product, is likely to constitute a breach of Articles I, III or XI of the GATT.

Article XX(a) provides an exception to such breaches where the measure is deemed to be necessary to protect public morals. To establish this exception, Australia would have to demonstrate that the relevant animal welfare concern was shared by a majority of the Australian public. Australia would also have to demonstrate that the adopted measure was capable of achieving its policy objectives and that there were no other less trade-restrictive options reasonably open to it. The measure would have to be applied in a consistent and reasoned fashion to all like-products traded by other member States and in the domestic market.

Engaging in extensive consultation with the relevant member State(s) over the animal welfare concerns, attempting to create bi/multilateral agreements, and providing technical or financial support to the affected member State(s) to assist them in addressing the issues before the trade measure is imposed, will reduce the unilateral nature of the measure and increase the chances of it being accepted by a Dispute Panel should a challenge to its validity arise. Accordingly, there is no reason for Australia to succumb to the 'regulatory chill' and to shy away from improving animal welfare standards in accordance with the values and evolving expectations of its citizens.

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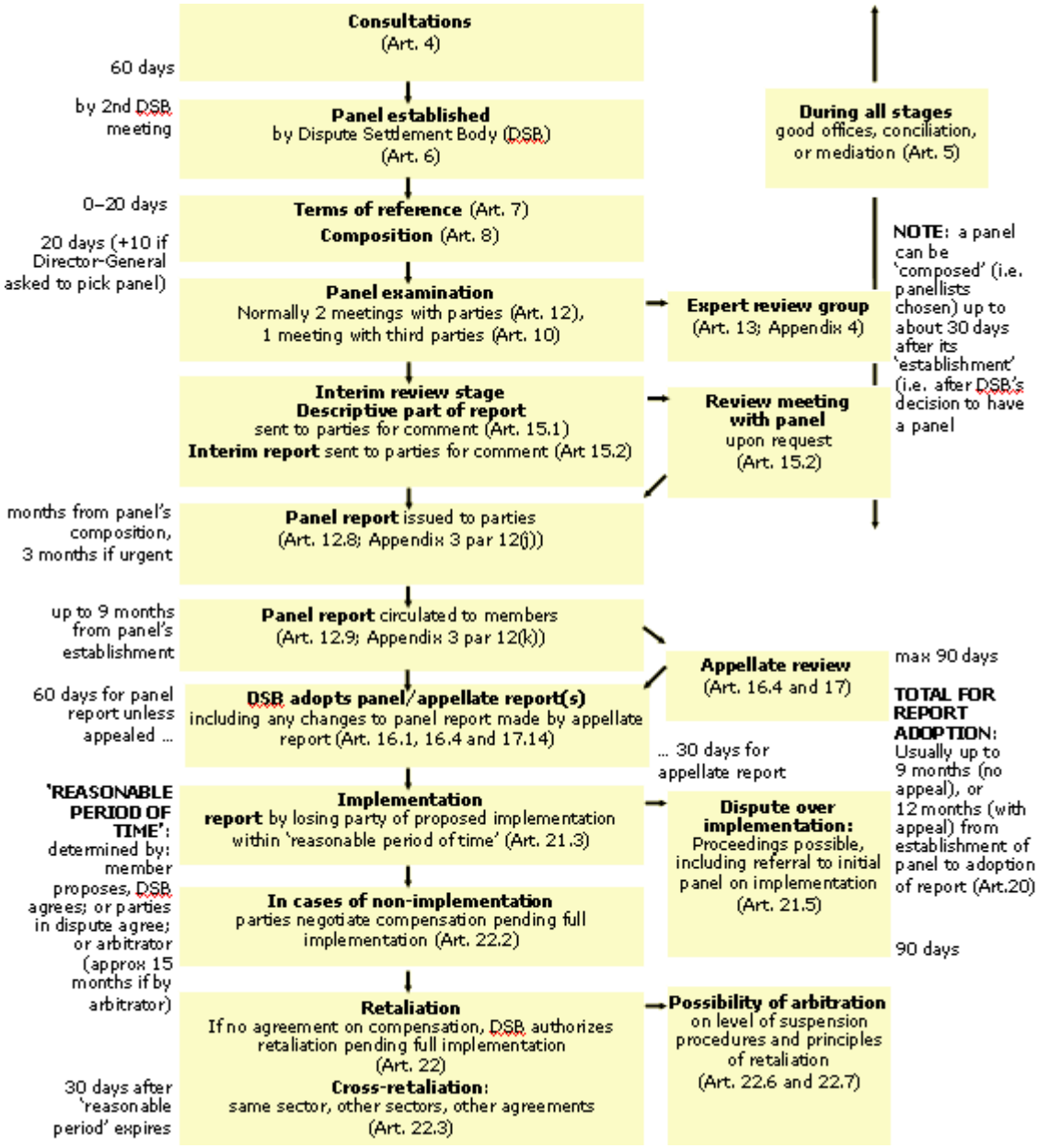
Attachment 1: Dispute settlement process[21]



[21] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm