Any experienced lawyer knows that cases are most often won or lost on procedural grounds; yet procedural issues are often considered too technical for proper treatment in legal literature. In this extensively revised new edition of Palmeter and Mavroidis’ authoritative book on WTO dispute settlement, the authors discuss all WTO dispute settlement provisions and their interpretation in WTO jurisprudence. All the decisions of panels and the Appellate Body are discussed, from the inception of the WTO in 1995 until the end of May 2003. Although the book contains considerable technical expertise, it is at the same time written for accessibility to a wide readership. This volume – an essential tool for practitioners, diplomats and government lawyers – is a comprehensive study of compulsory third party adjudication in international law.

David Palmeter is a partner in the law firm of Sidley Austin Brown & Wood LLP, and a long-time advisor of governments and interested private parties in WTO dispute settlement proceedings. From 1994 to 1998 he was liaison for the International Bar Association to GATT, the WTO and UNCTAD. He is a regular lecturer on WTO law at numerous universities, and is the author of The WTO as a Legal System.

Petros C. Mavroidis is Professor of Law at Columbia Law School, New York, and the University of Neuchâtel, Switzerland. He previously taught at the European University Institute, Florence and was with the GATT/WTO Legal Service from 1992 to 1996. He is currently chief co-reporter of the American Law Institute for the project on “Principles of WTO Law.”
DISPUTE SETTLEMENT IN
THE WORLD TRADE
ORGANIZATION

Practice and Procedure

Second Edition
DAVID PALMETER AND PETROS C. MAVROIDIS
Legal progress is often secreted
in the interstices of legal procedure.

– Oliver Wendell Holmes, Jr.
CONTENTS

Preface page xvii

1 Overview 1

§ 1.01 The ITO, the GATT, and the WTO 1
[1] Bretton Woods and the Havana Charter 1
[4] GATT’s 47 “provisional” years 4
[5] GATT dispute settlement 6

§ 1.02 The Uruguay Round 11

§ 1.03 The World Trade Organization 13

§ 1.04 The Dispute Settlement Body 15

§ 1.05 The Dispute Settlement Understanding 16

2 Jurisdiction 17

§ 2.01 Overview 17

§ 2.02 Terms of reference 18
[1] Rationale for terms of reference 18
[2] Parallelism between consultations and terms of reference 18
[4] Non ultra petita 19
[5] The obligation of panels to consider all issues referred to in the terms of reference 20
[6] Parallelism between the terms of reference and submissions to a panel 21

§ 2.03 Jurisdiction Ratione Materiae 21
[1] Covered agreements 21

vi
CONTENTS

[3] Simultaneous application of different agreements 22
[4] Non-application between particular Members 23
[5] The DSU and the competence of other WTO bodies 23
[8] Change in legal justification for a measure 26
[9] Measures no longer in effect 26
[10] Review of measures taken to comply with rulings and recommendations of the DSB 28

§ 2.04 Jurisdiction Ratione Personae 29
[1] Non-Members 29
[2] Regional and local government measures 30
[3] Application of customary international law to WTO Members 32

§ 2.05 Standing (Locus Standi) 33
[1] Requirement of a legal interest 33
[2] Exhaustion of local remedies 34
[3] Participation by amicus curiae 35

§ 2.06 Review of jurisdictional claims 40
[1] Challenge to jurisdiction by parties 40
[2] Ex officio review of jurisdiction 40
[4] Estoppel 43

§ 2.07 Arbitration 45

§ 2.08 Appellate jurisdiction 46
[1] General 46
[2] Questions of municipal law 46

3 Sources of Law 49

§ 3.01 Overview 49

§ 3.02 Covered agreements 51

§ 3.03 Reports of prior panels and the Appellate Body 51
[1] GATT practice 52
CONTENTS

[3] Unadopted GATT Reports in the WTO 54
[5] Appellate Body Reports 60

§ 3.04 Custom 65

§ 3.05 Teachings of the most highly qualified publicists 66

§ 3.06 General principles of law 68

§ 3.07 Other international agreements 69
[1] Agreements referred to in the WTO Agreements 69
[2] Other multilateral agreements 73
[3] Agreements between the parties 75
[4] Agreements to which the WTO is a party 78

§ 3.08 Decisions of other international tribunals 79

§ 3.09 Interpretation of WTO law 80
[2] Travaux préparatoires 81
[3] Use of dictionaries 82
[4] Lex specialis 82
[5] Principle of “contemporaneity” 83
[6] Principle of “effectiveness” 84

4 The Panel Process 85

§ 4.01 Overview 85

§ 4.02 Good offices, conciliation and mediation 86

§ 4.03 Consultations 86
[1] Purpose 86
[2] Form and content of the request 87
[3] Whether consultations occur 89
[4] Adequacy of consultations 90
[5] Confidentiality 91
[6] Time elements 93

§ 4.04 Request for the establishment of a panel and terms of reference 94
[2] Time elements 95
[3] Form and content 96
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.05</td>
<td>Establishment and composition of panels</td>
<td>105</td>
</tr>
<tr>
<td>4.06</td>
<td>Function, authority and responsibility of panels</td>
<td>108</td>
</tr>
<tr>
<td>4.07</td>
<td>Third parties, multiple complainants and counter-complaints</td>
<td>109</td>
</tr>
<tr>
<td>4.08</td>
<td>Role of the Secretariat</td>
<td>114</td>
</tr>
<tr>
<td>4.09</td>
<td>Evidence and information</td>
<td>116</td>
</tr>
<tr>
<td>4.10</td>
<td>Confidential information</td>
<td>135</td>
</tr>
</tbody>
</table>

[5] Amendment of measures after the panel request 98
[6] The “claim” or the legal basis of the complaint 99
[7] Products listed in the request 101
[8] Standard terms of reference 102
[9] Special terms of reference 103
[10] Reviews and arbitrations 103

§ 4.05 Establishment and composition of panels 105
[1] Establishment 105
[2] Composition 105
[3] Nominating panelists 106

§ 4.06 Function, authority and responsibility of panels 108

§ 4.07 Third parties, multiple complainants and counter-complaints 109
[1] Overview 109
[3] Third party rights in reviews and arbitrations 111
[4] Multiple complainants 111
[5] Counter-complaints 112
[6] Amicus curiae briefs 113

§ 4.08 Role of the Secretariat 114

§ 4.09 Evidence and information 116
[2] Panel’s right to seek evidence and information 116
[3] Duty to provide evidence and information 117
[4] Adverse inferences 118
[5] Experts 121
[6] Admissions and statements 123
[7] Deadlines for submission of evidence 125
[8] Evidence not used in reaching national decisions 128
[9] Evidence of municipal law 129
[10] Sufficiency and forms of evidence 133

§ 4.10 Confidential information 135
[1] Overview 135
[2] Issues involving private counsel and advisors 136
[3] Special procedures to protect confidentiality 138
§ 4.11 Burden of proof 143

[1] General 143
[2] Burden of proving a prima facie case 144
[5] “General rule-exception” analysis 150
[6] Article 22.6 arbitrations 152

§ 4.12 Standard of review 152

§ 4.13 Written submissions to panels 156

[1] General 156
[2] First written submission 156
[3] Second written submission 158
[4] Executive summaries of submissions 159

§ 4.14 Meetings of panels with the parties 159

[1] General 159
[2] First meeting of the Panel with the parties 159
[3] Second meeting of the Panel with the parties 160

§ 4.15 Computation of time 161

§ 4.16 “Violation,” “non-violation” and “other situation” complaints 162

[1] General 162
[2] Violation complaints 163
[3] Non-violation complaints 163
[4] “Other situation” complaints 164

§ 4.17 Representation by private attorneys 165

§ 4.18 Panel reports 166

[1] General 166
[2] Descriptive portions of the report 166
[3] Interim reports 167
[4] Final reports 168

5 Special Rules and Procedures 171

§ 5.01 Overview 171

§ 5.02 GATT and WTO rules for developing countries 171
## CONTENTS

§ 5.03 The 1966 Understanding and developing countries 172
   [1] Consultations 172
   [2] Good offices, conciliation or mediation 173

§ 5.04 Developing country-related provisions of the DSU 174
   [1] Consultations 174
   [2] Panel process 174

§ 5.05 Agreement on the Application of Sanitary and Phytosanitary Measures 175

§ 5.06 Agreement on Technical Barriers to Trade 175
   [1] General 175
   [2] Measures covered by the TBT Agreement 176

§ 5.07 Agreement on Implementation of Article VI of GATT 1994 (Antidumping Agreement) 177
   [1] General 177
   [2] Establishment of a panel 178
   [3] The “matter” before an antidumping panel 179
   [4] Article 17.6 – standard of review 179
   [5] Article 17.6(i) – review of factual determinations 180
   [6] Article 17.6(ii) – review of legal determinations 182
   [7] Confidential information 183
   [8] Developing countries 184
   [9] Overlap with countervailing duties 184

§ 5.08 Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation Agreement) 185

§ 5.09 Agreement on Subsidies and Countervailing Measures 185
   [1] Prohibited subsidy procedures 186
   [3] Procedures before the Permanent Group of Experts 188
   [4] Actionable subsidy procedures 190
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Overview</td>
<td>The Appellate Process</td>
<td>210</td>
</tr>
<tr>
<td></td>
<td>§ 6.01</td>
<td>Overview</td>
<td>210</td>
</tr>
<tr>
<td></td>
<td>§ 6.02</td>
<td>The task of the Appellate Body</td>
<td>210</td>
</tr>
<tr>
<td></td>
<td>§ 6.03</td>
<td>Right of appeal</td>
<td>212</td>
</tr>
<tr>
<td>§ 5.10</td>
<td>Agreement on Textiles and Clothing (ATC)</td>
<td>195</td>
<td></td>
</tr>
<tr>
<td></td>
<td>§ 5.11</td>
<td>General Agreement on Trade in Services (GATS)</td>
<td>200</td>
</tr>
<tr>
<td></td>
<td>§ 5.12</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)</td>
<td>203</td>
</tr>
<tr>
<td></td>
<td>§ 5.13</td>
<td>Agreement on Government Procurement</td>
<td>203</td>
</tr>
<tr>
<td></td>
<td>§ 5.14</td>
<td>Agreement on Trade in Civil Aircraft</td>
<td>206</td>
</tr>
<tr>
<td>§ 5.15</td>
<td>Arbitration</td>
<td>206</td>
<td></td>
</tr>
<tr>
<td></td>
<td>§ 5.10</td>
<td>Agreement on Subsidies and Technical Measures</td>
<td>193</td>
</tr>
<tr>
<td></td>
<td>§ 5.11</td>
<td>Agreement on Establishment, Performance and Supply of Services</td>
<td>194</td>
</tr>
<tr>
<td></td>
<td>§ 5.12</td>
<td>Agreement on Government Procurement</td>
<td>195</td>
</tr>
<tr>
<td></td>
<td>§ 5.13</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)</td>
<td>198</td>
</tr>
<tr>
<td></td>
<td>§ 5.14</td>
<td>Agreement on Trade in Civil Aircraft</td>
<td>199</td>
</tr>
<tr>
<td>§ 5.15</td>
<td>Arbitration</td>
<td>199</td>
<td></td>
</tr>
<tr>
<td></td>
<td>§ 5.10</td>
<td>Agreement on Subsidies and Technical Measures</td>
<td>193</td>
</tr>
<tr>
<td></td>
<td>§ 5.11</td>
<td>Agreement on Establishment, Performance and Supply of Services</td>
<td>194</td>
</tr>
<tr>
<td></td>
<td>§ 5.12</td>
<td>Agreement on Government Procurement</td>
<td>195</td>
</tr>
<tr>
<td></td>
<td>§ 5.13</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)</td>
<td>198</td>
</tr>
<tr>
<td></td>
<td>§ 5.14</td>
<td>Agreement on Trade in Civil Aircraft</td>
<td>199</td>
</tr>
<tr>
<td>§ 5.15</td>
<td>Arbitration</td>
<td>199</td>
<td></td>
</tr>
</tbody>
</table>
§ 6.04 Appellate Body Rules 212
[1] Overview 212
[2] Prohibited subsidy cases 212
[4] Decision making and collegiality 213
[5] Documents 214
[8] Appellant's submission 217
[9] Appellee's submission 218
[10] Multiple or “cross” appeals 219
[12] Record on appeal 220
[14] Written responses to questions 221
[16] Representation by private attorneys 223
[17] Amicus curiae briefs 223

§ 6.05 Time elements 224
[1] Limits imposed by the DSU 224
[2] Limits imposed by the Appellate Body 225

§ 6.06 Lack of remand authority 227
[1] The problem 227
[2] Legal issues undecided by a panel 228
[3] Factual issues undecided by a panel 232

7 Adoption and Implementation of Reports 234

§ 7.01 Overview 234

§ 7.02 Consideration and adoption of reports 234

§ 7.03 Notification of implementation intentions 235

§ 7.04 “Reasonable period of time” 236
[1] Legal framework 236
[4] Agreements establishing the reasonable period of time 239
[5] Time within which to request arbitration 240
CONTENTS

§ 7.05 Factors affecting time allowed for implementation 242
[1] Overview 242
[3] Need for legislative action 244
[4] Domestic opposition 245
[5] Economic harm 246
[6] Developing countries 246

§ 7.06 Surveillance by the DSB 247

§ 7.07 Disputes regarding implementation 247
[1] Overview 247
[2] Scope of Article 21.5 “compliance” review 249
[3] Standing of respondent to initiate Article 21.5 proceedings 253
[6] Burden of proof 256
[7] Third party rights 256
[8] Suggestions as to implementation 258

§ 7.08 Prohibited and actionable subsidies 258

§ 7.09 “Other situation” complaints 261

8 Remedies 262

§ 8.01 General 262

§ 8.02 GATT practice 262

§ 8.03 Overview of the WTO remedy regime 265

§ 8.04 Negotiation on compensation 265

§ 8.05 Suspension of concessions or other obligations 266
[1] Request for authorization to suspend concessions 266
[2] “Carousel” suspension 269
[3] Jurisdiction of the arbitrators 269
[4] Consequences of arbitration 271
[7] Information submitted by private parties 274
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>[8] Applicable principles</td>
<td>275</td>
</tr>
<tr>
<td>[9] Third party rights</td>
<td>277</td>
</tr>
<tr>
<td>§ 8.06 The “sequencing” problem</td>
<td>278</td>
</tr>
<tr>
<td>[1] Overview</td>
<td>278</td>
</tr>
<tr>
<td>[2] Bananas III</td>
<td>280</td>
</tr>
<tr>
<td>[4] Proposals for change</td>
<td>286</td>
</tr>
<tr>
<td>§ 8.07 Prohibited and actionable subsidies</td>
<td>290</td>
</tr>
<tr>
<td>[1] Overview</td>
<td>290</td>
</tr>
<tr>
<td>[3] Multiple complainants</td>
<td>293</td>
</tr>
<tr>
<td>§ 8.08 Panel and Appellate Body implementation suggestions</td>
<td>295</td>
</tr>
<tr>
<td>[1] Overview</td>
<td>295</td>
</tr>
<tr>
<td>[2] Antidumping and countervailing duty cases</td>
<td>296</td>
</tr>
<tr>
<td>[3] Other WTO cases</td>
<td>298</td>
</tr>
<tr>
<td>[4] Legal effect of implementation suggestions</td>
<td>299</td>
</tr>
<tr>
<td>§ 8.09 “Other situation” reports</td>
<td>300</td>
</tr>
<tr>
<td>§ 8.10 Purpose of suspension of concessions</td>
<td>300</td>
</tr>
<tr>
<td>9 Conclusion</td>
<td>303</td>
</tr>
<tr>
<td>Appendix</td>
<td>306</td>
</tr>
<tr>
<td>Bibliography</td>
<td>310</td>
</tr>
<tr>
<td>Index</td>
<td>316</td>
</tr>
</tbody>
</table>
PREFACE

This is a work for practitioners – for diplomats, government officials and lawyers – who prepare and present cases to dispute settlement panels of the World Trade Organization (WTO) and its Appellate Body, and for private practitioners who advise or represent governments and private clients with an interest in the outcomes of these proceedings. It grew from the experience of its authors, a private practitioner who has advised and represented governments and private parties under both the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), and a former official of the Legal Affairs Division of both GATT and the WTO, who advised numerous panels.

The book attempts to address the kinds of procedural questions that confront practitioners in the very practical world of dispute settlement. While it relies heavily on panel and Appellate Body jurisprudence, it also describes the informal practices and WTO “ways of doing things” that have evolved, both to facilitate the dispute settlement process and to contend with the lacunae in the legal texts that time has exposed. From time to time we do comment critically on the decisions of panels and the Appellate Body, but this is not the focus of the book. Scholars increasingly are producing critical and analytical procedural literature, to which we refer at appropriate points in the text and list in the bibliography.

The first edition of this work, which appeared in 1999, contained extended annexes setting forth the text of the Understanding on Rules and Procedures Governing the Settlement of Disputes and the relevant dispute settlement provisions of other WTO agreements. For this edition, we concluded that the widespread availability of those documents makes their further reproduction here unnecessary. They may be found at the WTO’s web site, www.wto.org, and are published in a convenient volume by the WTO and Cambridge University Press in The WTO Dispute Settlement Procedures, now in its second edition.

Chapter 3 of this volume is a now highly revised version of an article, The WTO Legal System: Sources of Law, that first appeared in volume 92 of
the American Journal of International Law, © The American Society of International Law, which has kindly consented to its use here.

For their assistance in answering questions, furnishing documents, or reading and commenting on early versions of the text, we thank: Guy Evans, Todd J. Friedbacher, Reto Malacrida, Niall P. Meagher, Julia Pain, Yves Renouf, Celso de Tarso Pereira, Arun Venkataraman, Joelle Vuillemenot, Hannu Wager, Jasper-Martijn Wauters, Rhian-Mary Wood-Richards, and Werner Zdouc. Special thanks to Laurie Hieta, who read every word and checked every footnote, a task that called for courage above and beyond the call of duty.