

# **Mutually Agreed Solutions in WTO DS**

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- **Description of MAS**

- **Observations**

- **Conclusions**

# MAS and other WTO Legal Remedies

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	MAS	Compliance	Compensation	Retaliation
Member Implementing the Legal Remedy	Complainant and Defendant (PR/LR)	Defendant (PR)	Complainant and Defendant (LR)	Complainant (LR)

## **MAS *De Jure***

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1. Consistency with the covered agreements (Art 3.5 & 3.7)
  - Nullify or impair benefits
  - Objective of those agreements.
2. Notification (Art 3.6)
3. MAS is preferred over other legal remedies (Art 3.7, 4.3, 11, 12.7 & 22.8)

# MAS *de Facto*

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## 1. MAS on procedural stages

- *US – AD on steel* (WT/DS344/17) on sequencing
  - ✓ 22.6 request outside the 30-day time period

## 2. MAS on steps towards compliance

### Forward looking (Steps to comply)

- RPT in *Mx – Telecoms* (WT/DS204/7)
  - ✓ Two steps to comply with the report

### Backward looking (termination)

- *EC – Biotech (Canada)* (WT/DS292/40)
  - ✓ Without prejudice to the the WTO Agreements
  - ✓ Concretization of periodical market access dialogue

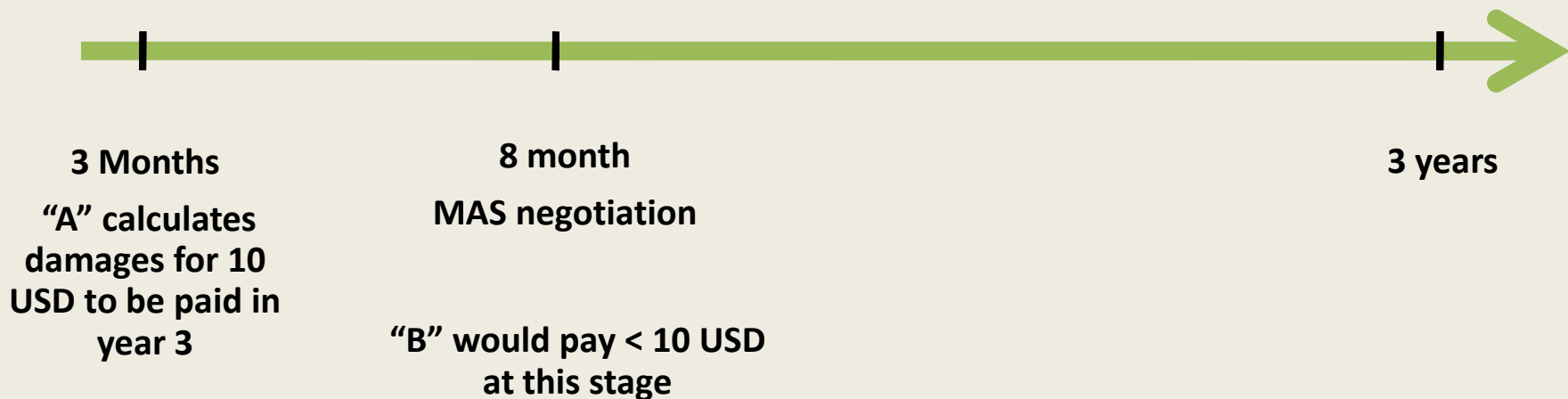
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# MAS – Bargaining power

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- The terms of the MAS are limited by the bargaining power of the parties, which is limited—among others—by the potential gains of litigation.

## Hypothetical “A” vs “B”



# MAS – Bargaining power

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## In *US – Cement*

- ✓ AD order was held to be GATT illegal and later NAFTA illegal (Art 1904 Panels)
- ✓ MAS was signed on 6 March 2006 at a final WTO panel stage (deliberation of the panel)
- ✓ AD order to be terminated in March 2009
- ✓ The MAS may be terminated with a 90-day-notice

# MAS Enforceability – Procedural Rights

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## EC – Bananas (AB)

- Preclusion from 21.5 Panel/AB with explicit or implicit waiver by the parties

### Hypothetical

#### MAS on Cement

- WTO-MAS notified in 2007 (matter raised by Mexico in the dispute)
- The order to be revoked in 2009
- No WTO DS for Mexico after 2007?

## India – Autos (Panel)

- The US was not bound by the EC-India MAS (third parties)
- Vienna Convention Arts 31 and 32
- Not the same measure (1997 MAS and new DS Case)

But what about a MAS modifying WTO substantive law?

## MAS Enforceability – Unclear

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- MAS that are WTO-plus
  - ✓ *EC – Biotech* (Canada) on periodical dialogue
  - ✓ Hypothetical MAS:
    - Enhanced transparency on NTBs
    - Arbitration under the MAS
- MAS that are WTO-minus
  - ✓ Decisions may limit GATT principles (*EC – Preferences* on Enabling C. and MFN)
  - ✓ How would a MAS work?

# MAS – Upstream Process

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- MAS at consultations
  - ✓ *Panama – Milk from Mexico (329)*
- AD price undertaking
  - ✓ *US - Tomatoes from Mexico*
- Doha negotiation on NTBs
  - ✓ Horizontal mechanism seeking MAS at the committee level

# Multijurisdictional MAS

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- MAS on Cement
  - One WTO Panel
  - Sixteen NAFTA Chapter 19 panels (AD)
  - Domestic litigation
  
- MAS on Softwood lumber
  - 6 WTO Panel/AB
  - 11 NAFTA Chapter 19 Panels (AD)
  - Domestic litigation

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## MAS - Conclusions

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- Other WTO legal remedies increase/decrease bargaining power to negotiate MAS
- MAS waiving DSU standing may be dangerous
  - No further legal remedies in case MAS breached
  - Third parties have not been affected
- MAS modifying WTO substantive law have not been fully explored
  - Key for utilization of liability rules