A
DISSERTATION
ON

WTO & IT'S DISPUTE SETTLEMEMT BODY

IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE
OF

MASTER OF LAWS

SUBMITED BY: -

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CERTIFICATE

This is to certify that the entire work embodied in the practical title "WTO & IT'S DISPUPTE SETTLEMNT BODY" has been carried out by MR. DHIRAJ GOLE, under my supervision and guidance in the department of Law, New Law College, Bharati Vidhyapeeth Deemed University, Pune for the L.L.M (Trimester) 1 year course.

Place:-Pune **PROF. U.S. DIVE**

Date: - ***(Research Guide)***

DECLARATION

I hereby declare that the entire work embodied in the practical paper title "**WTO & IT'S DISPUTE SETTLEMENT BODY"** is written by me and submitted to New Law College, Bharati Vidhyapeeth, Pune. The present work is of original nature and the conclusion is based on the data collected by me. To the best of my knowledge this work has not been submitted previously, for the awards of any degree or diploma, to this or any other university.

Signature

Place: Pune

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ACKNOWLEDGEMENT

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WTO DISPUTE SETTLEMENT BODY

1. Significance:

- Trade related disputes which take place around the world need to be settled effectively.

- Apart from resolving disputes the sole purpose is to ensure free flow of trade.

- The growing need of globalisation and the development of economy at large it becomes crucial to resolve the differences between the “States” and to develop new & promising relations between various states and for the same purpose it is important to sort out the issues if any, which hampers the growth of nations.

2. Research Problem:

To examine with the help of various laws, conventions, treaties & also with the help of case laws the role of "WTO & It's Disputes Settlement Body" in resolving the disputes between nations arising out of trade.

3. Hypothesis:

The hypothesis which are put to test are as follows:-

(1) Dispute settlement body of WTO is the uttermost important branch of WTO and is successful in resolving disputes at International level.

(2) WTO helps in development of International Economic law and does automatically strengthens International Trade.

4.**Research methodology**:

The purpose of this research is to study different statutes, books, cases, articles, reports etc. and uncover different studies and development in this field. Hence, the research methodology adopted here will be purely doctrinal.

5. Sources of data collection

i. Books on WTO & Dispute Settlement Body.
ii. Various Agreements between the States.
iii. Conventions & Treaties.
iv. Related articles.
v. E-sources.

WORLD TRADE ORGANISATION

&

DISPUTE SETTLEMENT BODY

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WTO &IT'S DISPUTE SETTLEMENT BODY

Sr.No.1

PREFACE

The following "Dissertation" reflects the World Trade Organization's Dispute Settlement Body and its major role in solving the disputes which arise out various agreements which may be regional or due to various other trade related issues.

The very first Chapter focuses upon the WTO and its formation, history, functions and various other aspects along with the crucial pointer of Dispute Settlement Body.

All the disputes which relate to "Trade" are settled by the Dispute Settlement Body if the parties are member to the said WTO organization and also as per the fulfillment of the requirements of WTO.

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List of Abbreviations

Abbreviation	**Full form**
AB	Appellate Body
BISD	Basic Instrument and Selected Body
CTE	Committee on Trade and Environment
CTS	Council For Trade in Services
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding (WTO Understanding on Rules and Procedures Governing the Settlement of Disputes)
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECT	European Court Treaty
ECtHR	European Court of Human Rights
EEC	European Economic Community
EJIL	European Journal of International Law
EU	European Union
FRD	Friendly Relation Declaration
GA	General Assembly
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMOs	Genetically Modified Organisms
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly

ICSID	International Center for Settlement of Investment Disputes
IIL	Institute of International Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Matters
IMF	International Monetary Fund
ITU	International Telecommunication Union
JAMA	Japanese Automobile Manufacturers Association
JWT	Journal on World Trade
KAMA	Korean Automobile Manufacturers Association
LIEI	Legal Issues of Economic Integration
MFN	Most Favoured Nations
MOP	Meeting of Parties
MP	Montreal Protocol
N	Foot Note
NAFTA	North American Free Trade Agreement
Para	Paragraph
PCIJ	Permanent Court of International Justice
RTA	Regional Trade Agreement
SATAP	So As To Afford Protection
TBT	Agreement on Technical Barriers to Trade
TREMs	Trade Related Environment Measures
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law Of Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
USTR	United States Trade Representative
VCLT	Vienna Convention of Law of Treaties
Vol	Volume
WTO	World Trade Organization
WSSD	World Summit on Sustainable Development
YBEL	Year Book on European Environment Law

Chapter No. 1

Introduction

(i) Brief History of WTO
(ii) Aim & functions.
(iii) What they stand for?
(iv) What they do?
(v) Structure of WTO.
(vi) Benefits.
(vii) Introductions to Dispute Settlement Body of WTO.
(viii) Latest News.

Introduction to Wto dIspute settlement:

"**Trade is the oldest and the most important economic nexus among nations**."

- **Robert Gilpin**

The Term Trade means "The act or process of buying, selling or exchange of commodities at either wholesale or retail within a country or between countries"[1]. Thus, Trade is being defined as "Trade involves the transfer of the ownership of goods or services from one person or entity to another in exchange of goods or services or for money"[2]

The Highest Authority which deals with Trade aspects is the World Trade Organization (WTO) .The World Trade organization deals with the global rules of trade between nations and its main functions is to ensure that trade flows as smoothly, predictably and freely as possible.[3]

(i) Brief History of WTO:

The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986–94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the 'Doha Development Agenda' launched in 2001.

"Bretton Woods Conference" held in 1994 was the starting point for a new world order. It was envisaged that the new world economic order would be organized around three international institutions:

[1]Black's Law Dictionary, 8th Edition.
[2] John H. Jackson: International Economic law Series defines the word "Trade"
[3] World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.

(i) The International Bank for Reconstruction and Development.
(ii) International Monetary fund.
(iii) International Trade Organization.

While the first two institutions came into existence and exist even today, the third institution i.e. ITO never came into existence. After having been approved by the government of U.S and the U.K, proposals for the establishment of ITO were discussed at an International Conference on trade and Employment first in London in 1946, then at Geneva and finally in Havana in 1947-1948.

Despite the non-adoption of the charter of ITO, U.S, U.K and some other developed nations were keen to ensure reduction of trade barriers. Some of the participants in London conference on trade and employment requested that simultaneously with the continuing discussions of Trade Charter at Geneva, extensive trade tariff negotiations be started. 23 nations participated in these negotiations and as a result of this an extensive set of bilateral trade concessions were then extended to all participants and were incorporated in a Geneva Agreement on Tariff and Trade, 1947. Since the ITO charter had not come into existence, the US and other countries wanted to have General Agreement on Tariff and Trade (GATT) implemented as early as possible. Since the implementation of some of the clauses of GATT required parliamentary approval in some of the countries the GATT itself could not be applied. To overcome this difficulty a "Protocol of Provisional Application" (PPA) was signed in late 1946 by 22 original members as GATT. This protocol came into effect on January 1, 1948 and GATT was applied through this Protocol.

As per preamble of the GATT the main objectives were to:

(i) Raise the standard of living
(ii) Ensure the full employment, to increase the volume of real income and effective demand.
(iii) Ensure better utilization of resources of the world
(iv) Ensure expansion of production and international trade.

Since the establishment of GATT, eight rounds of negotiations to reduce the tariffs and trade barriers in the trade in goods have been held. These rounds of negotiations are being summarized below.

(1) **The Geneva Round (1947)**: Participated by 23 countries Geneva Round of negotiations were held between 10th April, 1947. These negotiations resulted in exchange of tariff cuts for 45000 products worth $ 10 billion of trade on annual basis.

(2) **The Amnesty Round, 1949**: The second round was held at Amnesty in 1949. In this round nine new countries joined bringing the membership of GATT to 32. In this round custom duties were reduced of 5,000 items of goods.

(3) **The Torguay Round, 1950- 1951**: The round was held at Torguay in 1950-51. 38 countries participated. The European countries with low tariff levels were not satisfied and felt that the negotiations were disadvantages to them.

(4) **The Geneva Round 1955-56**: The fourth Round was held at Geneva in 1955-1956. European Countries were again disappointed and withfrew from negotiations and thus the number fell down to 22.

(5) **The Dillon Round 1960-1961**: The fifth Round was held at Geneva in 1960-1961. In this Round EEC joined negotiations as a trade block. The U.S Government obtained the authority under the Trade Agreement Extension Act, 1958 to draw maximum advantage and participations in multilateral Trade.

(6) **The Kennedy Round, 1964-1967**: The 6th Round known as Kennedy Round of negotiations was attended by 48 countries. About 35 developing countries also participated under special procedures. 50% reduction offer in industrial tariffs was announced by eleven industrialized countries.

(7) **The Tokyo Round, 1973-1979**: The Tokyo Round of negotiations were attended by as many as 99 countries coming from different levels of development and economic systems. During the Tokyo Round, a number of agreements in specific non-tariff measures and on agriculture products were reached.

(8) **The Uruguay Round, September 1986 to December. 1993**: The Uruguay Round of negotiations began in Uruguay in September, 1986 and culminated on December15, 1993. Delegations from 117 countries accepted by consensus a GATT world treaty to open international markets and to ensure global economic growth into the 20th Century. The Uruguay Round of Multilateral Trade Negotiations were concluded on 15th April, 1994 at

Marrakesh. The GATT 1994 more popularly known as the Dunkel Agreement, finally emerged as World Trade Organization in 1995.[4]

As a result of the culmination of Uruguay Round of GATT negotiations for more than 7 years at Marrakesh, as many as 125 countries including India agreed to the establishment of World Trade Organization which came into effect on January 1, 1995 with the backing of 85 founding members including India replaced the GATT Agreement.

The WTO is in fact the main organ for implementation of Multilateral Trade Agreements. It is the negotiating forum for the members. It can be regarded as the 3rd economic pillar of worldwide trade and commerce dimensions along with the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (World Bank)

Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to open markets for trade. But the WTO is not just about opening markets, and in some circumstances its rules support maintaining trade barriers — for example, to protect consumers or prevent the spread of disease.

At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.

The system's overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side effects — because this is important for economic development and well-being. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be 'transparent' and predictable.

[4] International Law & Human Rights, S.K.Kapoor, 17th Edition, Central Law Agency.

(ii) Aim & Functions of WTO:

"The World Trade Organization (WTO) deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible."

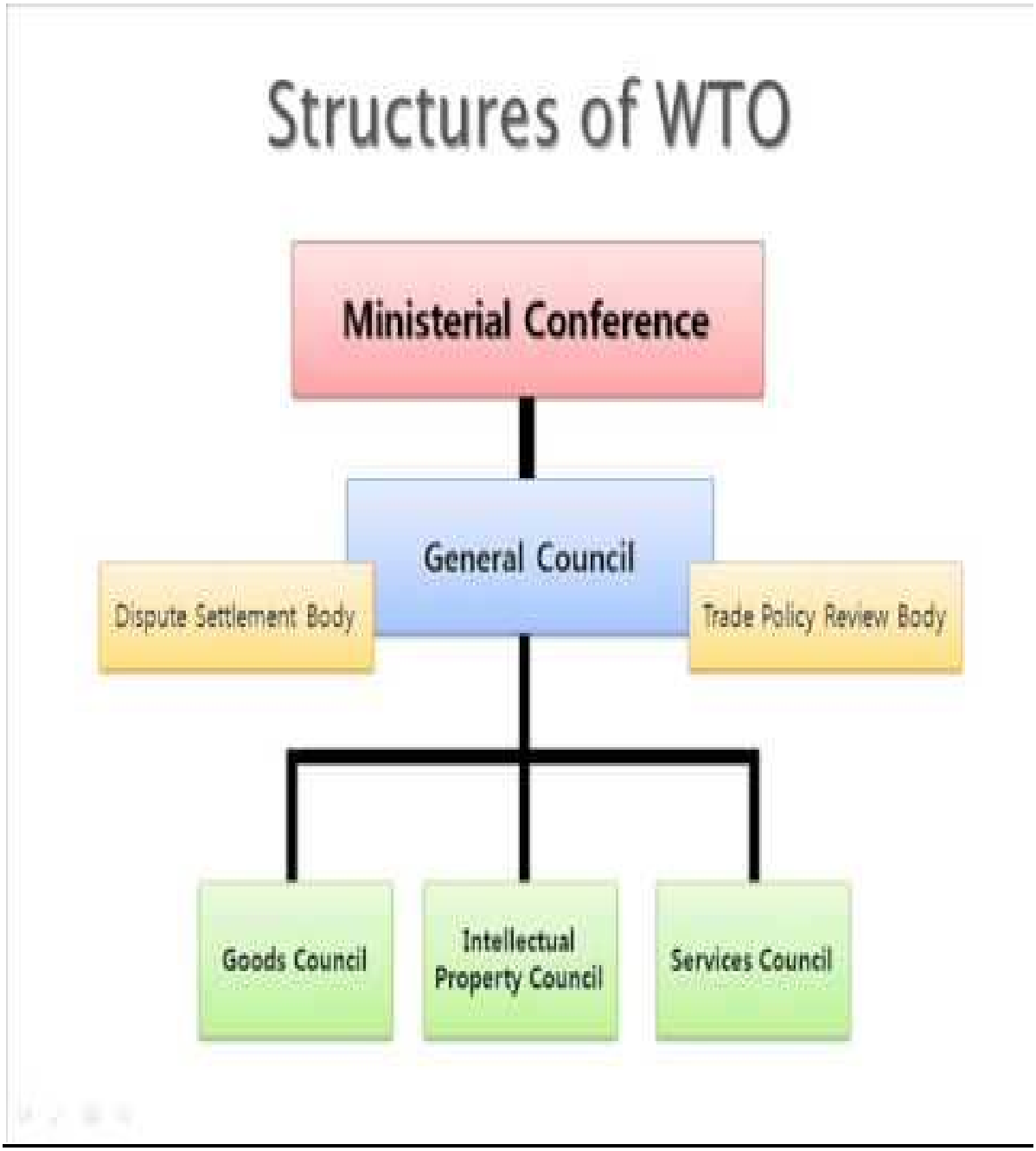
(iii) What they stand for?

- The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities. But a number of simple, fundamental principles run throughout all of these documents. These principles are the foundation of the multilateral trading system.
- **More open**: Lowering trade barriers is one of the most obvious ways of encouraging trade; these barriers include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively.
- **Predictable and transparent** : Foreign companies, investors and governments should be confident that trade barriers should not be raised arbitrarily
- **More competitive** : Discouraging 'unfair' practices, such as export subsidies and dumping products at below cost to gain market share; the issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.
- **More beneficial for less developed countries**
- **Protect the environment**: The WTO's agreements permit members to take measures to protect not only the environment but also public health, animal health and plant health

(iv) <u>What they do?</u>

- The WTO is run by its member governments. All major decisions are made by the membership as a whole, either by ministers (who usually meet at least once every two years) or by their ambassadors or delegates (who meet regularly in Geneva).
- Trade negotiations: The WTO agreements cover goods, services and intellectual property. They spell out the principles of liberalization, and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They set procedures for settling disputes.
- Implementation and monitoring: WTO agreements require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted. Various WTO councils and committees seek to ensure that these requirements are being followed and that WTO agreements are being properly implemented.
- Dispute settlement: The WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly.
- Building trade capacity: WTO agreements contain special provision for developing countries, including longer time periods to implement agreements and commitments, measures to increase their trading opportunities, and support to help them build their trade capacity, to handle disputes and to implement technical standards. Aid for Trade aims to help developing countries develop the skills and infrastructure needed to expand their trade.
- Outreach: The WTO maintains regular dialogue with non-governmental organizations, parliamentarians, other international organizations, the media and the general public on various aspects of the WTO and the ongoing Doha negotiations, with the aim of enhancing cooperation and increasing awareness of WTO activities.

(v) Structure of WTO.



(vi) Benefits

1. The system helps promote peace.
2. Disputes are handled constructively.
3. Rules make life easier for all.
4. Freer trade cuts the costs of living.
5. It provides more choice of products and qualities.
6. Trade raises incomes.
7. Trade stimulates economic growth.
8. The basic principles make life more efficient.
9. Governments are shielded from lobbying.
10. The system encourages good government [5]

(vii) Introductions to Dispute Settlement Body of WTO.

Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements

The WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding is Vial for enforcing the rules and this ensures that trade flows smoothly.

A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made in WTO. The authors of these agreements are the member government themselves ---- the agreements are the outcome of negotiations among members. Ultimate responsibility for settling dispute also lies with member governments, through the Dispute Settlement Body.[6]

The WTO Agreements provide for many wide ranging broadly formulated rules concerning international trade in goods, trade in services and trade related aspects

[5] www.wto.org

[6] World Trade Law: Text, Material and Commentary, Simon & Bryan MercurioWithArwel and Kara Leithner, 2010, 1st Print.

of intellectual property rights. In view of the importance of their impact economic and otherwise it is not surprising that WTO members do not always agree on the correct interpretation application of these rules. In fact, Members frequently argue about whether or not a particular law or practice constitutes a violation of right or obligation provided for in a WTO agreement. The WTO has remarkable system to settle disputes members concerning their rights and obligations under the WTO agreements – but "**The Dispute Settlement**" is one of the core functions of the WTO [7].

The WTO dispute settlement system has been operational for 18 years now. In that period it has arguably been the most prolific of all international state-to-state dispute settlement systems. Between 1st January, 1995 – 31st December, 2012 a total of 454 disputes have been brought to the WTO for resolution and more than fifth of the disputes brought to the WTO, the parties were able to reach an amicable solution through consultation or the dispute was otherwise resolved without recourse to adjudication and in other disputes parties have resorted to adjudication. Such adjudication resulted in 183 reports of dispute settlement panels and 109 reports of the Appellate Body[8].

WTO Dispute Settlement has obviously been very active as compare to its "predecessor", i.e.: GATT dispute settlement. During the 47years of the GATT dispute settlement system, only 132 GATT disputes settlement reports were issued[9].

The WTO dispute settlement system has been used by developed country members and developing country members also. In the Years 2000, 2001, 2003, 2005, 2008, 2010 and 2012, developing countries were more active in bringing the disputes than the developed countries. Thus the most important aspect to be considered while is most small nations which are very small and are developing where able to bring the disputes against the most powerful nations and the earlier were successful in winning the disputes against the super power nations. This ultimately resulted into more media attention than anything before.[10]

[7] Principles of International Economic Law, Matthias Herdegen, The Oxford University Press, First Published 2013.

[8] International Law, Oppenheim, 6th Edition.

[9] John H. Jackson: International Economic law Series, The Oxford University Press, Published 2009.

[10] Studies in International Law, Bin Cheng, The Oxford University Press, 2011 published

There are case laws, for example, for dispute on national legislation for the protection of public health or the environment such as follows:

- the *EC – Hormones (1998)*dispute on the European Union's import ban on meat from cattle treated with growth hormones (complaints by the United States and Canada)[11];

- the *US – Shrimp (1998)* dispute on the US import ban on shrimp harvested with nets that kill sea turtles(complaints by India, Malaysia, Pakistan and Thailand)[12];

- the *Brazil – Retreaded Tyres (2007)*dispute on a Brazilian ban on the import of retreaded tyres for environmental reasons (complaint by the European Union)[13];

- the *EC – Approval and Marketing of Biotech Products (2006)*dispute on measures affecting the approval and marketing of genetically modified products in the European Union (complaint by the United States, Canada and Argentina)[14];

- the *US – Clove Cigarettes (2012)*dispute concerning a tobacco-control measure taken by the United States that prohibits cigarettes with 'characterizing flavours' other than tobacco or menthol (complaint by Indonesia)[15];

- the *US – Tuna II (Mexico) (2012)*dispute concerning US regulation on the use of the dolphin-safe label on tuna cans[16]; and

- the currently pending *Canada ---Feed-In Tariff/Renewable Energy* dispute concerning measures relating to renewable energy generation (complaints by the European Union and Japan)[17].

[11]www.icj.co.in
[12]Binding Advisory Opinion of ICJ, Robert Ago, 2010 publication.

[13]www.icj.co.in
[14] Ibid
[15] Ibid
[16] Ibid
[17]Binding Advisory Opinion of ICJ, Robert Ago, 2010 publication

- Also, the *EC – Bananas III (1997)* dispute on the European Communities' preferential import regime for bananas was, for many years, headline news (complaints by Ecuador, Guatemala, Honduras, Mexico and the United States)[18].

- Other highly 'sensitive' disputes include *the EC and certain member States – Large Civil Aircraft (2011) and US – Large Civil Aircraft (2nd complaint) (2012)* disputes concerning subsidies to Airbus and Boeing respectively (complaints by the United States and the European Union respectively)[19].

  "The latter two disputes were undoubtedly the biggest and the most complex disputes handled by the WTO dispute settlement system to date. Many trade remedy cases and I particular those concerning zeroing also caused much commotion although perhaps more among the industries or companies directly affected than among the general public".[20]

The WTO dispute settlement system which has been in operation, since, 1st January, 1995 was not established out of blue. This system is mostly based on the 50 years of experience in the resolution of trade dispute in the context of the GATT1947 Article 3.1 of the Dispute Settlement Understanding.

- "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947 and the rules and procedures as further elaborated and modified herein."[21]

[18]www.icj.co.in
[19] Ibid
[20]World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.

[21]International Law & Human Rights, Dr. H.O. Agarwal, Central Law Publication,7th Edition

The Main focuses on the basics of WTO dispute settlement and addresses in turn[22]:

(1) The jurisdiction of the WTO dispute settlement system

(2) Access to WTO dispute settlement

(3) The key features of WTO dispute settlement

(4) The Institutions of WTO dispute settlement

(5) The process of WTO dispute settlement

(6) Developing Country Members & WTO dispute settlement

All the above points highlight the provisions of WTO in detail and enlighten oneself with the detail functioning of WTO and its important role in development of trade around the globe.

Taking into account the various aspects mention above, every provision is elaborate in the following submission to make it clear view of WTO and the important role of "Dispute Settlement Body" in resolving disputes between the nations and fulfill the sole purpose of WTO of free & smooth flow of trade of the nations.

[22]International Law & Human Rights, Dr. S.K. Kapoor, Central Law Agency,17th Edition

(viii) Latest News:

- **Azevêdo reports strong engagement on Doha work programme talks**

At a meeting of all members on 29 January,2015, Director-General Roberto Azevêdo reported that the first week of intensive negotiations to agree a work programme on the remaining Doha Development Agenda issues had seen good progress and strong engagement. The Director-General launched this intensified process at an open-ended meeting of all members on 21 January, 2015.

- **20th anniversary of the WTO**:

In 2015, the WTO is commemorating its 20th anniversary. Many different activities are planned throughout the year to mark this event. On the occasion of the WTO's 20th birthday, Director-General Roberto Azevêdo said: "20 years ago, on 1 January 1995, the WTO opened its doors for business. Since then this organization, and the system of transparent, multilaterally-agreed rules that it embodies, has made a major contribution to the strength and stability of the global economy. Over the years the WTO has helped to boost trade growth, resolve numerous trade disputes and support developing countries to integrate into the trading system."

Chapter No 2.

Jurisdiction of the WTO Dispute Settlement system

Jurisdiction of the WTO dispute settlement system:

The WTO dispute settlement system stands out by virtue of the nature as well as the scope of its jurisdiction. This section examines these two aspects – nature and scope – of the jurisdiction of the WTO dispute settlement system in turn.

2.1 Nature of the Jurisdiction
2.2 Scope of the jurisdiction

2.1 Nature of the Jurisdiction:

Unlike the jurisdiction of other important State-to-State dispute settlement mechanisms, such as the International Court of Justice or the International Tribunal for the Law of the Sea, the jurisdiction of the WTO dispute settlement system is:

(1) Compulsory;
(2) Exclusive; and
(3) Only contentious (i.e. not advisory).

2.1.1 Compulsory Jurisdiction[23]:

The jurisdiction of the WTO dispute settlement system is compulsory in nature. A responding Member has, as a matter of law, no choice but to accept the jurisdiction of the WTO dispute settlement system. Note that Article 6.1 of the DSU states[24]:

"If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel".

Unlike in other international dispute settlement systems, there is no need for the parties to a dispute, arising under the covered agreements, to accept, in a separate declaration or separate agreement, the jurisdiction of the WTO dispute settlement system to adjudicate the dispute. Membership of the WTO constitutes consent to, and acceptance of the jurisdiction of the WTO dispute settlement system[25].

[23] World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.

[24] Ibid

[25] International Law, Oppenheim, 6th Edition.

2.1.2 **Exclusive Jurisdiction:**

The jurisdiction of the WTO dispute settlement system is also exclusive. Article 23.1 of the DSU states:
"*When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding"*[26].

Pursuant to this provision, a complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system.

The panel in *US – Section 301 Trade Act (2000)* ruled that Article 23.1 of the DSU[27]:
"Imposes on all Members [a requirement] to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations".

Article 23.1 of the DSU both ensures "*the exclusivity of the WTO vis-à-vis other international flora and protects the multilateral system from unilateral conduct".*[28]

As Article 23.2(a) of the DSU provides,
"Members are prohibited from making a determination to the effect that a violation has occurred, that benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of the DSU"[29].

While Members can only have recourse to the WTO dispute settlement system to resolve their disputes, this does not mean that these disputes can only be resolved

[26]Binding Advisory Opinion of ICJ, Robert Ago, 2010 publication
[27]Panel Report, US – Section 301 Trade Act (2000), para. 7.43. Emphasis added. The panel noted that this 'exclusive dispute resolution clause' is an important new element of Members' rights and obligations under the DSU
[28]Panel Report, EC – Commercial Vessels (2005) , para. 7.193. On the multilateral nature of WTO dispute settlement, see below, p. 182.
[29] ibid

through consultations between the parties or adjudication by a WTO panel and the Appellate Body[30].

It should be noted that the WTO dispute settlement system provides for several methods to resolve disputes. "*Consultations*" between the parties, provided for in Article 4 of the DSU, and *adjudication* by a panel and the Appellate Body, provided for in Articles 6 to 20 of the DSU, are by far the methods most frequently used, and therefore the focus of this chapter[31].

However, the WTO dispute settlement system also provides for other dispute settlement methods, and in particular:

(i) ***Arbitration*; and *good offices*,**
(ii) ***Conciliation***
(iii) ***Mediation*,** which are briefly discussed below.[32]

2.1.3 Contentious Jurisdiction:

Unlike the International Court of Justice or the International Tribunal for the Law of the Sea, the WTO dispute settlement system has only contentious, and not advisory, jurisdiction.[33]

In *US – Wool Shirts and Blouses (1997)*, the Appellate Body held:

"Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute."[34]

The WTO dispute settlement system is called upon to clarify WTO law only in the context of an actual dispute.

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[30] Ibid
[31] International Law, Oppenheim, 6th Edition.
[32] On the various methods of WTO dispute settlement, p. 180, International Law & Human Rights, Dr. H.O. Agarwal, Central Law Publication, 7th Edition.

[33] World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.
[34] Appellate Body Report, US – Wool Shirts and Blouses (1997), 340

In *EC – Commercial Vessels (2005)*, "the panel declined to address a matter before it because it did not consider that 'an abstract ruling on hypothetical future measures' was either necessary or helpful to the resolution of that dispute."[35]

2.2 Scope of Jurisdiction :[36]

This section on the scope of the jurisdiction of the WTO dispute settlement system deals with two separate but obviously closely related questions, namely:

(1) Which disputes are subject to WTO dispute settlement?
(2) Which measures can be subject to WTO dispute settlement?

2.2.1 Dispute Subject to WTO Dispute Settlement:

Article 1.1 of the DSU states, in relevant part:
"*The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements').*

The WTO dispute settlement system thus has jurisdiction " *ratione materiae*" *which means* "over disputes between WTO Members arising under the 'covered agreements". The covered agreements, referred to in Appendix 1 to the DSU, include the following:

"WTO Agreement, the GATT 1994 and all other multilateral agreements on trade in goods, the GATS, the TRIPS Agreement, the DSU and the plurilateral Agreement on Government Procurement".[37]

It is clear that the scope of jurisdiction of the WTO dispute settlement system is very broad as it ranges from disputes over measures regarding customs duties,

[35] Report, EC – Commercial Vessels (2005) ,para. 7.30. Note, however, that the panel in EC – Bananas III (Article 21.5 – EC) (1999) considered it did have jurisdiction in spite of the fact that there were no respondents in this case. The panel ruled against the European Communities and the report was never put on the agenda of the DSB for adoption and remained unadopted.
[36] World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print
[37] Only two WTO agreements are not 'covered agreements': the *Trade Policy Review Mechanism* and the plurilateral *Agreement on Trade in Civil Aircraft.*

disputes regarding sanitary measures, disputes regarding subsidies, disputes regarding measures affecting market access for services, to disputes regarding intellectual property rights enforcement measures[38].

2.2.2 Measures subject to WTO Dispute Settlement

While the DSU refers in many of its provisions to the 'measure' or 'measures' that can be subject to WTO dispute settlement, it does, however, not define this term.[39]

In *US – Corrosion-Resistant Steel Sunset Review (2004)*, the Appellate Body ruled that:
"any act or omission attributable to a WTO Member can be a measure of that member for purposes of dispute settlement proceedings."[40]

However, this general statement leaves a number of questions regarding the precise scope of the measures that can be challenged in WTO dispute settlement proceedings unanswered. The following paragraphs focus on seven 'typical' measures that can be the 'measure at issue' in WTO disputes[41]:

(1) action or conduct by private parties attributable to a Member;
(2) measures that are no longer in force;
(3) legislation 'as such' (as opposed to the actual application of this legislation in specific cases);
(4) discretionary legislation (as opposed to mandatory legislation);
(5) unwritten 'norms or rules' of Members;
(6) ongoing conduct by Members; and
(7) measures by regional and local authorities.

[38] Ibid 34
[39] International Law, Oppenheim, 6th Edition.
[40] Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review (2004), para. 81

[41] John H. Jackson: International Economic law Series, The Oxford University Press, Published 2009.

(1) The question whether ***action or conduct by private parties***, the **first category** of 'typical' measures mentioned above, can be subject to WTO dispute settlement arises because the WTO agreements, as is traditionally the case with international agreements, bind the States that are party to them, not private parties. As clearly stated by the panel in *Japan – Film (1998)*:

As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term "*measure*" in Article XXIII: 1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties.[42]

Nevertheless, the panel in *Japan – Film (1998)* recalled that various GATT panels have had to deal with the question whether:

"What appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions".[43]

For private actions to be attributed to a government – and therefore potentially be subject to WTO dispute settlement– there has to be a certain level of government involvement in the private action.

The panel in *Japan – Film (1998)* ruled in this respect:

Past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.[44]

Each case will have to be examined on its facts to determine whether the level of "*government involvement*" in the actions of private parties is such that these actions can be properly attributed to a Member.

[42] Panel Report, *Japan – Film (1998)*, para. 10.52.
[43] Ibid
[44] Ibid

Note in this regard Article 8 of the International Law Commission's "*Articles on Responsibility of States for Internationally Wrongful Acts*", which states:

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct."[45]

Any measure, including action or conduct by private parties, which can be properly attributed to a WTO Member, can be challenged in WTO dispute settlement proceedings.[46]

The **second category** of 'typical' measures, which can be subject to WTO dispute settlement, are "***measures that are no longer in force***."

As the Appellate Body noted in *China – Raw Materials (2012),*
"the DSU does not specifically address whether a WTO panel may or may not make findings and recommendations with respect to a measure that expires or is repealed during the course of the panel proceedings. Panels have made findings on expired measures in some cases and declined to do so in others, depending on the particularities of the disputes before them."[47]

In *US – Upland Cotton(2005),* the Appellate Body stated in this regard:
"*Whether or not a measure is still in force is not dispositive of whether that measure is currently affecting the operation of any covered agreement. Therefore, we disagree with the United States' argument that measures whose legislative basis has expired are incapable of affecting the operation of a covered agreement*

[45]Article 8, *Articles on Responsibility of States for Internationally Wrongful Acts 2001* , in *Yearbook of the International Law Commission*, 2001, Volume II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol.I)/Corr.4

[46]Note Article I:3(a)(ii) of the GATS which defines 'measures by Members' as including measures 'taken by nongovernmental bodies', i.e., private parties, 'in the exercise of powers delegated by central, regional or local governments or authorities'. Query whether measures that cannot be attributed to a Member cannot be subject to WTO dispute settlement. Note in this regard Article 11.3 of the Agreement on Safeguards, which stipulates that 'Members shall not encourage or support the adoption or maintenance by public and private enterprises of nongovernmental measures equivalent to those referred to in [Article 11.1]'. Article 11.1 of the Agreement on Safeguards : mentions, inter alia, voluntary export restraints, orderly marketing agreements, and any other similar measures on the export or the import side.

[47]Appellate Body Reports, China – Raw Materials (2012), para. 263.

in the present and that, accordingly, expired measures cannot be the subject of consultations under the DSU."[48]

A measure that is no longer in force can be challenged in WTO dispute settlement proceedings if that measure still affects the operation of a covered agreement. As discussed below, a Member may have recourse to WTO dispute settlement, whenever it considers that benefits accruing to it are being impaired by a measure taken by another Member.[49]

A Member may have reason to consider that a measure, which has expired, nevertheless still impairs benefits accruing to it. [50]

While a measure that has expired can be subject to WTO dispute settlement, the fact that a measure has expired may affect the recommendations a panel may make under Article 19.1 of the DSU. It is clear that a panel cannot recommend the withdrawal of a measure that has already expired.[51]

However, in *China – Raw Materials (2012),* the Appellate Body noted that *" a recommendation made with respect to a measure that has expired is 'prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption of a panel and/or Appellate Body report by the DSB"*[52]

The **third category** of 'typical' measures, which can be subject to WTO dispute settlement, concerns "*legislation as such*"[53]

It is clear that the WTO consistency of the actual application of specific national legislation can be challenged in WTO dispute settlement proceedings.

However, can national legislation as such, i.e. independently from its application in

[48]Appellate Body Report, US – Upland Cotton (2005), para. 262.

[49]International Law & Human Rights, Dr. H.O. Agarwal, Central Law Publication,7th Edition

[50]Appellate Body Report, US – Upland Cotton (2005), para. 26

[51]World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.

[52]Appellate Body Reports, *China – Raw Materials (2012)*, para. 260.

[53]While 'legislation as such' is referred to as a category of 'atypical' measures, it should be emphasized that 'legislation as such' is frequently subject to WTO dispute settlement

specific cases, be challenged in WTO dispute settlement proceedings?

In *US –1916 Act (2000)*, the Appellate Body recalled the GATT practice in this respect as follows:

"Prior to the entry into force of the WTO Agreement, it was firmly established that Article XXIII: 1(a) of the GATT1947 allowed a Contracting Party to challenge legislation as such, independently from the application of that legislation in specific instances."[54]

The Appellate Body noted that a number of WTO panels have – following this GATT practice – dealt with dispute settlement claims brought against a Member on the basis of its legislation *as such,* independently from the application of that legislation in specific instances.[55]

As already noted above, in *US – Corrosion-Resistant Steel Sunset Review (2004),* the Appellate Body stated in this regard that:

"any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[56]

The Appellate Body noted in particular that, in addition to acts applying legislation in a specific situation, also 'acts setting forth rules or norms that are intended to have general and prospective application' can be the subject of WTO dispute settlement.[57]

According to the Appellate Body, this is so because the disciplines of the WTO and its dispute settlement system that are intended to protect not only existing trade but also the security and predictability needed to conduct future trade.

This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once

[54]Appellate Body Report, US – 1916 Act (2000), para. 60. In a footnote, the Appellate Body referred, for example, to the GATT panel reports in US – Superfund (1987); US – Section 337 (1989); Thailand – Cigarettes (1990); and US –Malt Beverages (1992). The reference to these GATT panel reports should not be read as an endorsement of these reports.
[55]panel reports in Japan – Alcoholic Beverages II (1996); Canada – Periodicals (1997); EC – Hormones (1998); Korea – Alcoholic Beverages (1999); Chile – Alcoholic Beverages (2000); United States – FSC (2000); and United States – Section 110(5) Copyright Act (2000).
[56]Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review (2004), para. 81. 286.
[57]Principles of International Economic Law, Matthias Herdegen, The Oxford University Press, First Published 2013

they have been adopted and irrespective of any particular instance of application of such rules or norms.[58]

The **fourth category** of 'typical' measures, which can be subject to WTO dispute settlement, concerns "***discretionary legislation"***, i.e. legislation that leaves authorities leeway as to what action (WTO-consistent or WTO inconsistent)to take (whereas mandatory legislation does not leave such leeway).

The Appellate Body in *US – 1916 Act (2000)* noted that, in *examining* claims relating to legislation 'as such':
"panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations.[59]

The **fifth category** of 'typical' measures, which can be subject to WTO dispute settlement, are ***"unwritten 'norms or rules'* or *practices"*** of Members. The Appellate Body first addressed the question whether practices of Members can be challenged in WTO dispute settlement proceedings.

In *US – Zeroing (EC)(2006).* In that case, *"the United States argued on appeal that the panel had erred in finding that the zeroing methodology, which was not expressed in writing, was a measure that can be challenged, as such, in dispute settlement proceedings."*

In response, the Appellate Body first observed that – as discussed above – it had ruled in *US – Corrosion-Resistant Steel Sunset Review (2004)* that,
"any act or omission attributable to a WTO Member can be a measure of that member for purposes of disputes settlement proceedings'[60]and that '"acts setting forth rules or norms that are intended to have general and prospective application" are measures subject to WTO dispute settlement'.[61]

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[58]*Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para*. 14
[59]*Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para*. 14
[60]Appellate Body Report, *US – Zeroing (EC) (2006)*, para. 188, referring to Appellate Body Report, *US – Corrosion-*287*Resistant Steel Sunset Review (2004)*, para. 81
[61]Appellate Body Report, *US – Zeroing (EC) (2006)*, para. 189, referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review (2004)*, para. 82

Subsequently, the Appellate Body ruled that the determination whether a measure can be challenge in WTO dispute settlement proceedings 'must be based on the "content and substance" of the alleged measure, and "not merely on its form".'[62]

The **sixth category** of 'typical' measures, which can be subject to WTO dispute settlement, concerns '**ongoing conduct'** of Members.

In *US – Continued Zeroing (2009),* the question arose:
"Whether the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute "measures" that can be challenged in WTO dispute settlement".[63]

The Appellate Body agreed with the complainant, the European Union that this continued use did indeed constitute 'measures' that can be challenged in WTO dispute settlement.[64]
"*In reaching this conclusion, the Appellate Body observed that measures 'as such' and measures 'as applied', discussed above, are not the only types of measures that may be subject to challenge in WTO dispute settlement."*[65]

The **seventh and final category** of 'typical' measures, which can be subject to WTO dispute settlement, are *measures by regional or local authorities.* It is clear that measures by the central government of Members can be challenged in WTO dispute settlement proceedings and it is undisputed that the central government includes all branches of government (legislative, executive and judicial).

In *US – Shrimp (1998),* the Appellate Body ruled that a WTO Member 'bears responsibility for acts of all its departments of government, including its judiciary'[66].

However, do the' **acts of all its departments of government'** to which the Appellate Body refers include acts of regional or local authorities? This question

[62]Appellate Body Report, US – Zeroing (EC) (2006), para. 192, referring to Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review (2004), para. 87.
[63]Appellate Body Report, US – Continued Zeroing (2009), para. 185. On the 'zeroing methodology', see below, p.193.
[64]Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ,para. 14
[65] Ibid
[66]Appellate Body Report, US – Shrimp (1998), para. 173, referring in footnote to Appellate Body Report, United States– Gasoline (1996), p. 28.

may be of particular relevance to Members with a federal system of government under which the federal government may have little control over measures taken by sub-federal levels of government. [67]:

The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[68]

This appears to give a clear answer to the question whether measures by regional or local authorities can be challenged in WTO dispute settlement proceedings. Even in situations in which the central government lacks the authority under its constitution to 'control' regional or local authorities, measures by these regional or local authorities can be subject to WTO dispute settlement. Dispute settlement proceedings against such measures can be brought against the Member concerned.[69]

A final remark may be made on measures adopted or maintained by Member States of the European Union and all its twenty-seven Member States are WTO Members. Measures by EU Member States can, and have been, challenged in dispute settlement proceedings brought:

(1) against the EU Member State concerned;[70]
(2) against the European Union and the EU Member State(s) concerned;[71]or
(3) against the European Union alone[72]

[67]Binding Advisory Opinion of ICJ, Robert Ago, 2010 publication
[68]Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 , para.14
[69]Note that, unlike under the GATT 1994, under the GATS, measures by regional or local authorities are explicitly found to be attributable to the Member concerned. Article I:3(a)(i) of the GATS explicitly defines 'measures by Members' as 'measures by central, regional or local authorities'. Compare with Article XXIV:12 of the GATT 1994.
[70]Belgium – Administration of Measures Establishing Customs Duties for Rice (DS 210), concerning measures imposed by Belgium. In this dispute, a mutually agreed solution was notified to the DSB by the United States and the European Commission.
[71]EC and certain member States – Large Civil Aircraft (2011) , concerning measures by Germany, France, Spain and the United Kingdom, and the EU.
[72]EC – Asbestos (2001), concerning measures imposed by France

In all disputes involving measures of EU Member States, it was always the European Union which made the submissions and defended the EU Member State measure(s) concerned.[73]

[73]Panel Report, EC and certain member States – Large Civil Aircraft (2011)

Chapter 3.

Access to the WTO Dispute Settlement System

Access to the WTO dispute settlement system

(i) Right to recourse to WTO dispute settlement.
(ii) Access of Members other than parties.
(iii) Indirect access to WTO dispute settlement system.

Access to the WTO dispute settlement system

It is clear and undisputed that access to the WTO dispute settlement system is limited to Members of the WTO.

The Appellate Body ruled in *US – Shrimp (1998)*:
"It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental."[74]

The WTO dispute settlement system is a *government-to-government* dispute settlement system for disputes concerning rights and obligations of WTO Members. Only WTO Members can have recourse to WTO dispute settlement; only they are entitled to initiate proceedings against breaches of WTO law. The WTO Secretariat cannot prosecute breaches of WTO law on its own motion nor are other international organizations, non-governmental organizations, industry associations, companies or individuals entitled to do so[75].

While it is clear that only Members have access to the WTO dispute settlement system, the question arises whether WTO membership alone suffices to allow recourse to WTO dispute settlement or whether Members must have a specific trade or legal interest in having recourse.[76]

[74]Appellate Body Report, *US – Shrimp (1998)*, para. 101.
[75]Studies in International Law, Bin Cheng, The Oxford University Press, 2011 published.
[76]International Law & Human Rights, Dr. S.K. Kapoor, Central Law Agency,17th Edition.

3.1Right to recourse to WTO dispute settlement:

Each covered agreement contains one or more consultation and dispute settlement provisions. These provisions set out when a Member can have recourse to WTO dispute settlement. For the GATT 1994, the relevant provisions are Articles XXII and XXIII.[77]

Of particular importance is Article XXIII: 1 of the GATT 1994, which states: "*If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of the following"*[78]*:*

(a) The failure of another Member to carry out its obligations under this Agreement, or
(b) The application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) The existence of any other situation, the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other Member or Members which it considers to be concerned.[79]

The consultation and dispute settlement provisions of most other covered agreements incorporate, by reference, Articles XXII and XXIII of the GATT 1994[80].

For example, Article 11.1 of the *SPS Agreement*, entitled 'Consultations and Dispute Settlement', states:

[77]International Law & Human Rights, Dr. H.O. Agarwal, Central Law Publication,7th Edition.

[78] Ibid

[79]Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ,para. 14.

[80]World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.[81]

With regard to a Member's right to have recourse to WTO dispute settlement, the Appellate Body held in *India* –

Quantitative Restrictions (1999):

This dispute was brought pursuant to, *inter alia*, Article XXIII of the GATT 1994. According to Article XXIII, any Member which considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired as a result of the failure of another Member to carry out its obligations, may resort to the dispute settlement procedures of Article XXIII. The United States considers that a benefit accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under Article XVIII:B of the GATT 1994[82].

Therefore, the United States was entitled to have recourse to the dispute settlement procedures of Article XXIII with regard to this dispute.[83]

As was the case in *India – Quantitative Restrictions (1999)*, the nullification or impairment of a benefit (or the impeding of the realization of an objective) may, and most often will, be the result of a violation of an obligation prescribed by a covered agreement (see Article XXIII:1(a)). [84]

Nullification or impairment may, however, also be the result of 'the application by another Member of any measure, whether or not it conflicts with the provisions' of a covered agreement (see Article XXIII:1(b) and Article 26.1 of the DSU). [85]

Nullification or impairment may equally be the result of

[81] Ibid
[82] GATT & WTO principles.
[83] Ibid
[84] Remedial Aspects.
[85] ibid

'The existence of any other situation' (see Article XXIII: 1(c) and Article 26.2 of the DSU). Unlike other international dispute settlement systems, the WTO system thus provides for three types of complaint:

(1) 'violation' complaints ;
(2) 'non-violation' complaints; and
(3) 'situation' complaints.[86]

In the case of a 'non-violation' complaint or a 'situation' complaint, the complainant must demonstrate that there is nullification or impairment of a benefit or that the achievement of an objective is impeded.

The panel in *Japan – Film (1998)* stated with regard to non-violation claims that it must be demonstrated:
(1) that the imported products at issue are subject to and *benefiting from* a relevant market access concession;
(2) that the *competitive position* of the imported products is being upset (i.e. 'nullified or impaired'); and
(3) that the competitive position is being upset by (i.e. 'as the result of') the application of a *measure not reasonably anticipated*.[87]

According to the panel in *EC – Asbestos (2001),* "*nullification or impairment would exist, in the case before it, if the measure: has the effect of upsetting the competitive relationship between Canadian asbestos and products containing it, on the one hand, and substitute fibers' and products containing them, on the other*."[88]

In the case of a 'violation' complaint, however, there is no need for the complainant to show nullification or impairment of a benefit. There is a *presumption* of nullification or impairment when the complainant demonstrates the existence of the violation. Article 3.8 of the DSU states:[89]

[86]However, that, pursuant to Article XXIII:3 of the GATS, situation complaints are not possible in disputes arising under the GATS; and that, pursuant to Article 64.2 and 3 of the TRIPS Agreement and successive ministerial decisions, non-violation complaints and situation complaints are currently not possible in disputes arising under the TRIPS Agreement.
[87]Panel Report, *Japan – Film (1998),* para. 10.82. With regard to what a complainant must show in a non-violation complaint.
[88]Panel Report, *EC – Asbestos (2001),* para. 8.288. Emphasis added. With respect to non-violation complaints, see also Appellate Body Report, *EC – Asbestos (2001),* paras. 38 and 185–6.
[89] ibid

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.[90]

In only a few cases to date has the respondent argued that the alleged violation of WTO law did not nullify or impair benefits accruing to the complainant. In no case has the respondent been successful in rebutting the presumption of nullification or impairment. [91]

For instance, in *EC – Export Subsidies on Sugar (2005)*, the panel found, and the Appellate Body upheld on appeal, that the European Communities did not rebut the presumption of nullification or impairment.[92]

It has been suggested that this presumption of nullification or impairment is in fact not rebuttable.[93]

Violation complaints are by far the most common type of complaint. To date, there have been only **seven disputes** in which a non-violation complaint was filed.[94]

Note that the Appellate Body stated in *EC – Asbestos (2001)* that:
the *'non-violation' nullification or impairment remedy … 'should be approached with caution and should remain exceptional remedy.* [95]

[90]In US – Offset Act (Byrd Amendment) (2003), the Appellate Body concluded, pursuant to Article 3.8 of the DSU, that, to the extent that it had found the measure to be inconsistent with Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement, 'the [Offset Act] nullifies or impairs benefits accruing to the Apelles in this dispute under those Agreements'. See Appellate Body Report, US – Offset Act (Byrd Amendment) (2003), paras. 300–4. Appellate Body Report, EC – Bananas III (1997), paras. 249–54; and Appellate Body Report, EC – Export Subsidies on Sugar (2005), paras. 293–300

[91] ibid

[92]Appellate Body Report, EC – Export Subsidies on Sugar (2005), para. 298. In EC – Bananas III (1997), the European Communities also attempted – unsuccessfully – to rebut the presumption of nullification and impairment with respect to the Panel's findings of violation of the GATT on the basis that the United States has never exported bananas to the European Communities. See Panel Report, EC – Bananas III (1997), para. 7.398.

[93]Note that the panel in EC – Bananas III (1997) expressed doubts whether this presumption could be rebutted. Panel Report, EC – Bananas III (1997), para. 7.398.

[94]Note that Article 26.1 of the DSU provides for some special procedural rules applicable to non-violation complaints. For a list of disputes in which a non-violation claim was made (up to 30 September 2011), see WTO Analytical Index (2012), Volume II, 1883. For a recent example of non-violation claims, see Panel Reports, US – COOL(2012), paras. 7.900–7.907.

None of the non-violation complaints brought to the WTO to date has been successful.[96]Moreover, there has never been any adjudication of situation complaints.[97]

The difference between the WTO system and other international dispute settlement systems with regard to causes of action is, therefore, of little practical significance.

In *EC – Bananas III (1997),* the Appellate Body held:
"We believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII: 1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'.[98]

The first sentence of Article 3.7 of the DSU, to which the Appellate Body refers, states:
Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.

The Appellate Body explicitly agreed with the statement of the panel in *EC – Bananas III (1997)* that:
"*With the increased interdependence of the global economy … Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."*[99]

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[95]Appellate Body Report, EC – Asbestos (2001), para. 186. This was reiterated by the panel in US – Offset Act (Byrd Amendment) (2003) with regard to non-violation complaints under the SCM Agreement. See Panel Report, US – Off set Act (Byrd Amendment) (2003), para. 7.125.
[96]However, that, in all disputes in which there was a non-violation complaint, there were also violation complaints. These violation complaints were often successful. See e.g. US – Gasoline (1996); EC – Hormones (1998);Korea – Procurement (2000); US – Offset Act (Byrd Amendment) (2003); and China – Auto Parts (2009). 290
[97]GATT Analytical Index (WTO, 1995), 668–91. Pursuant to Article 26.2 of the DSU, the procedural rules of the Decision of 12 April 1989, and not the rules of the DSU, apply to situation complaints. As a result, reports addressing a situation complaint would have to be adopted by consensus, rather than by reverse consensus.

[98]Appellate Body Report, *EC – Bananas III (1997),* para. 135. The Appellate Body also noted in *EC – Bananas III(1997)* that the DSU neither explicitly stated nor implied that a Member must have a 'legal interest' to have recourse to WTO dispute settlement.
[99]The Appellate Body referred to Panel Reports, *EC – Bananas III (1997),* para. 7.50.

Note that, in *EC – Bananas III (1997)*, the Appellate Body decided that the United States could bring a claim under the GATT 1994 despite the fact that the United States does not export bananas. In coming to this decision, the Appellate Body considered the fact that the United States is a producer and a potential exporter of bananas, the effects of the EC banana regime on the US internal market for bananas and the fact that the US claims under the GATS and the GATT 1994 were inextricably interwoven. The Appellate Body subsequently concluded: Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994.[100]

The Appellate Body added, however, that:
"This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case"[101].

In *Mexico – Corn Syrup (Article 21.5 – US) (2001)*, the Appellate Body ruled
"with respect to the role of panels in assessing a Member's decision to have recourse to WTO dispute settlement: Given the 'largely self-regulating' nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgment as to whether recourse to that panel would be 'fruitful'. Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgment."[102]

A Member's decision to start WTO dispute settlement proceedings is thus largely beyond judicial review.

The 'hands-off' approach of panels was clearly reflected in *Colombia – Ports of Entry (2009).*
In this case, the panel found that:
"It is satisfied that a sufficient basis exists for Panama to bring its claim under Article I:1 of the GATT 1994, with respect to subject textiles … and footwear … As noted, Panama … has stated its interest in exporting domestically

[100] Appellate Body Report, *EC – Bananas III (1997)*, para. 138.
[101] Ibid
[102] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US) (2001)*, para. 74. The Appellate Body referred to its earlier finding, quoted above, in *EC – Bananas III (1997)*, para. 135.

produced footwear … in the future, and stated its potential to manufacture textiles in the future. In the Panel's view, Panama has sufficiently demonstrated its interest in a determination of rights and obligations under the WTO Agreement."[103]

Accordingly, the panel concluded that Panama was entitled to bring, and had sufficient interest to initiate and proceed with, an Article I: 1 claim against Colombia.[104]

Note, however, that, although a Member's decision to have recourse to WTO dispute settlement is largely beyond judicial review, it is apparent from the 'success rate' of complainants in WTO dispute settlement that Members do duly exercise their judgment as to whether recourse to WTO dispute settlement will be '*fruitful*'.[105]
To date, panels have agreed with the complainant in 89 per cent of disputes brought before them that the respondent acted inconsistently with WTO law.[106]

3.2 Access of Members other than parties

In addition to the complainant and, albeit not by its own choice, the respondent, other Members may also have access to WTO dispute settlement proceedings. As discussed in more detail below, if consultations are conducted pursuant to Article XXII of the GATT 1994 (rather than Article XXIII) thereof, any Member, which has a 'substantial trade interest' in the consultations, can be allowed to join, i.e. to participate, in these consultations.[107]

More importantly, any Member, having a 'substantial interest' in a matter before a panel and having notified its interest in a timely manner to the DSB, may be a third party in the panel proceedings;[108]and any Member, who was a third party in the panel proceedings, may be a third participant in the Appellate Body proceedings.[109]

[103]Panel Report, *Colombia – Ports of Entry (2009)*, para. (7).329.
[104] ibid
[105]The limitation of retaliation to nullification and impairment suffered operates as a disincentive to bringing cases where there is no actual or reasonably potential trade interest.
[106]Eighty-nine per cent is the percentage of disputes in which panels found *at least one* WTO inconsistency.
[107]Article 4.11 of the DSU. For a further discussion of the right to join consultations.
[108]Article 10 of the DSU. On the rights of third parties in panel proceedings,
[109]17.4 of the DSU. On the rights of third participants in Appellate Body proceedings

Third parties and third participants have a *right* to be heard by the panel and the Appellate Body respectively. While only Members having a 'substantial interest' in the matter before the panel may become third parties, it is very rare for parties to challenge the third party status of a Member claiming to have such an interest.[110]

3.3 Indirect access to the WTO dispute Settlement system

As discussed above, only WTO Members have access to the WTO dispute settlement system. Companies, industry associations or NGOs cannot have recourse to WTO dispute settlement, nor can they join consultations or be a third party or third participant in panel or Appellate Body proceedings. Yet, it would be incorrect to state that companies, industry associations and NGOs are not 'involved' in WTO dispute settlement. [111]

It is undisputed that most of the disputes brought to the WTO dispute settlement system are brought by Members *at the instigation of* a company or industry association. Companies and industry associations are the 'driving force' behind the initiation of dispute settlement proceedings in most cases. In fact, it is hard to identify cases in which this was not so. Moreover, companies or industry associations will not only lobby governments to bring dispute settlement cases to the WTO, they (and their law firms) will often also play an important, 'behind-the-scenes' role in planning the legal strategy and drafting the submissions. It could be argued that companies and industry associations have an 'indirect' access to the WTO dispute settlement system and make abundant use of this 'indirect' access.

The legal system of some WTO Members explicitly provides for the possibility for companies and industry associations to bring a violation of WTO obligations, by another WTO Member, to the attention of their government and to 'induce' their

[110]Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ,para. 14

[111]International Law & Human Rights, Dr. H.O. Agarwal, Central Law Publication,7th Edition

government to start WTO dispute settlement proceedings against that Member. In EU law, this possibility is provided for under the Trade Barriers Regulation;[112] in US law, under Section 301 of the 1974 Trade Act; [113] and, in Chinese law, under the Investigation Rules of Foreign Trade Barriers.[114]

In many other Members, the process of lobbying the government to bring WTO cases has not been regulated and institutionalized in the same manner, but the process is no less present. In addition to this 'indirect' access, it should also be noted that, according to the Appellate Body, companies and industry associations as well as NGOs can be 'involved' in panel and Appellate Body proceedings as an *amicus curiae*.[115]

[112]Council Regulation (EC) No. 3286/94 on Community procedures for the exercise of rights under international trade rules, in particular those established under the WTO, OJ 1994, L349, 71, as amended by Council Regulation (EC) No. 356/95, OJ 1995, L41, 3.
[113]Section 301(a)(1) of the Trade Act 1974, 19 USC 2411(a)(1). 291
[114]Investigation Rules of Foreign Trade Barriers, entered into force on 1 March 2005. The English translation of these rules is available on the official website of the Ministry of Commerce of China
[115]On *amicus curiae* briefs, pg 56-57.

Chapter 4.

Key Features of WTO Dispute Settlement

(i) Single, comprehensive and integrated system
(ii) Different methods of dispute settlement
(iii) Multilateral Dispute Settlement
(iv) Preference for mutually acceptable solutions
(v) Mandate to clarify WTO provisions
(vi) Remedies for breach

Key Features of WTO dispute settlement

The prime object and purpose of the WTO dispute settlement system is the *prompt settlement of disputes* between WTO Members concerning their respective rights and obligations under WTO law, and to provide *security and predictability* to the multilateral trading system.

As stated in Article 3.3 of the DSU, the prompt settlement of disputes is:
essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.[116]

Article 3.2 of the DSU states:
"*The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements"*

According to the panel in *US – Section 301 Trade Act (2000)*, the WTO dispute settlement system is one of the *most important instruments* of the WTO in protecting the security and predictability of the multilateral trading system.[117]

The role of '**precedent**' in WTO dispute settlement, the Appellate Body ruled in *US – Stainless Steel (Mexico)(2008)* that ensuring security and predictability, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[118]

The importance of WTO dispute settlement to the multilateral trading system is uncontested, and the frequent and successful recourse to WTO dispute settlement to date confirms and reinforces this importance.[119]This section describes key features of WTO dispute settlement, which, in addition to the compulsory and

[116]The Appellate Body referred to this principle of 'prompt settlement of disputes' in, e.g. Appellate Body Report, US– Upland Cotton (Article 21.5 – Brazil) (2008), para. 246; and in Appellate Body Report, US – Zeroing (Japan) (Article21.5 – Japan) (2009), para. 122.
[117]Panel Report, US – Section 301 Trade Act, para. 7.75
[118]Appellate Body Report, US – Stainless Steel (Mexico) (2008), para. 160
[119] ibid

exclusive jurisdiction of the WTO dispute settlement system, discussed above, and the process of WTO dispute settlement, discussed below, contribute to, if not explain, the importance and success of WTO dispute settlement to date. Some of these features set apart the WTO dispute settlement system from other international dispute settlement mechanisms.[120]

This section discusses in turn:
(1) the single, comprehensive and integrated nature of the WTO dispute settlement system;
(2) the methods of WTO dispute settlement;
(3) the multilateral nature of WTO dispute settlement;
(4) the preference for mutually acceptable solutions;
(5) the mandate to clarify WTO provisions; and
(6) remedies for breach of WTO law.

Other key features, such as the short time frames, confidentiality and transparency, and appellate review, are discussed separately in subsequent sections.[121]

4.1 Single, comprehensive and integrated system

The DSU provides for a single dispute settlement system applicable to disputes arising under any of the covered agreements.[122]

This is different from the pre-WTO situation when each of the GATT agreements had its own dispute settlement system and the jurisdiction of each of these systems was limited to disputes arising under a specific agreement. Needless to say that this created a degree of confusion and uncertainty, especially when a measure was allegedly inconsistent with more than one GATT agreement. [123]

While the DSU now provides for a single WTO dispute settlement system, some of the covered agreements provide for some special and additional rules and procedures 'designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement'.[124]

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[120] With regard to the compulsory jurisdiction, see above, p. 126. With regard to e.g. remedies, appellate review and time frames, see below, pp. 124 (remedies), 231 (appellate review), 246 (timeframes)
[121] ibid
[122] Appellate Body Report, *Guatemala – Cement I (1998)*, para. 64.
[123] International Law & Human Rights, Dr. H.O. Agarwal, Central Law Publication, 7th Edition
[124] ibid

Pursuant to Article 1.2 of the DSU, these special or additional rules and procedures *prevail* over the DSU rules and procedures to the extent that there is a 'difference' between them.

The Appellate Body in *Guatemala –Cement I (1998)* ruled in this regard:

"If there is no 'difference', then the rules and procedures of the DSU apply together with the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail".[125]

The special and additional rules and procedures of a particular covered agreement combine with the generally applicable rules and procedures of the DSU 'to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*'[126]

4.2 Different methods of dispute settlement

As noted above, the WTO dispute settlement system provides for several dispute settlement methods. In addition to "*consultations*", i.e. negotiations, between the parties, provided for in Article 4 of the DSU, and *adjudication* by a panel and the Appellate Body, provided for in Articles 6 to 20 of the DSU, which are by far the methods most frequently used and the methods focused on in this chapter, the WTO dispute settlement system also provides for other dispute settlement methods, and in particular: arbitration; and good offices, conciliation and mediation. [127]

Pursuant to Article 25 of the DSU, "*parties to a dispute arising under a covered agreement may decide to resort to arbitration as an alternative means of binding*

[125]The Appellate Body further noted that: 'A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.' See ibid. See also Appellate Body Report, *US – Hot-Rolled Steel (2001),* paras. 55 and 62, and below, p. 734, with regard to Article 17.6 of the *Anti-Dumping Agreement*.
[126]Appellate Body Report, *Guatemala – Cement I (1998),* para. 66.
[127]World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.

dispute settlement, rather than have the dispute adjudicated by a panel and the Appellate Body."[128]

When parties opt for arbitration, they must agree on the procedural rules that will apply to the arbitration process; and they must explicitly agree to abide by the arbitration award.[129]

Arbitration awards need to be consistent with WTO law,[130]and must be notified to the DSB where any Member may raise any point relating thereto.[131]To date, Members have resorted only once to arbitration under Article 25 of the DSU.[132]

The DSU also provides for arbitration in Articles21.3(c) and 22.6. As discussed below, these arbitration procedures concern specific issues that may arise in the *context* of a dispute, such as the determination of the reasonable period of time for implementation (Article 21.3(c) of the DSU) and the appropriate level of retaliation (Article 22.6 of the DSU).[133]

Members frequently resort to arbitration under Article 21.3(c) or 22.6. As mentioned above, the DSU also provides for *good offices, conciliation* and *mediation* as methods of dispute settlement. These dispute settlement methods are provided for in Article 5 of the DSU. Their use may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time.[134]

Their use requires the agreement of all parties to the dispute.[135]Proceedings involving good offices, conciliation and mediation are confidential, and without prejudice to the rights of either party in any further proceedings under the DSU.[136]

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[128]Article 25.1 of the DSU refers to 'expeditious' arbitration, suggesting that this dispute settlement method will be quicker and more efficient than adjudication pursuant to Articles 6 to 20 of the DSU.
[129]Articles 25.2 and 25.3 of the DSU.
[130]Article 3.5 of the DSU.
[131]Article 25.3 of the DSU.292
[132]In 2001, the United States and the European Communities resorted to arbitration under Article 25 to resolve a dispute on the appropriate level of compensation due by the United States after it failed to comply with the panel report in *US – Section 110(5) Copyright Act (2000).* See Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article25) (2001)*, Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, dated 9 November 2001.
[133] ibid
[134]Article 5.3 of the DSU.
[135]Article 5.1 of the DSU.
[136]Article 5.2 of the DSU.

Pursuant to Article 5.6 of the DSU, the WTO Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with a view to assisting Members to settle a dispute.[137]

However, similar to arbitration under Article 25 of the DSU, Members have made little use of these dispute settlement methods.[138]

4.3 **Multilateral Dispute Settlement**:

The object and purpose of the WTO dispute settlement system is for Members to settle disputes with other Members through the *multilateral* procedures of the DSU, rather than through *unilateral* action.

Article 23.1 of the DSU states:
"When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

According to the Appellate Body in US – Certain EC Products (2001), Article 23.1 of the DSU imposes a general obligation to redress a violation of WTO law through the multilateral DSU procedures, and not through unilateral action."[139]

Pursuant to Article 23.2 of the DSU, WTO Members may not make a *unilateral* determination that a violation of WTO law has occurred and may not take retaliation measures *unilaterally* in the case of a violation of WTO law.[140]

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[137]In July 2001, the Director-General reminded Members of his availability to help settle disputes through good offices, mediation or conciliation. See Communication from the Director-General, Article 5 of the Dispute Settlement Understanding, WT/DSB/25, dated 17 July 2001.

[138]To date there has been no reported instance of the use of the dispute settlement methods referred to in Article 5 of the DSU. See WTO Analytical Index (2012), Volume II, 1555–6

[139]Appellate Body Report, US – Certain EC Products (2001), para. 111. The panel in this case noted that unilateral action is contrary to the essence of the multilateral trading system because such action threatens the system's stability and predictability. See Panel Report, US – Certain EC Products (2001), para. 6.14.

[140]The panel in EC – Commercial Vessels (2005) held that the obligation to have recourse to the DSU when Members seek the redress of a violation covers any act of a Member in response to what it considers to be a violation of a WTO obligation. See Panel Report, EC – Commercial Vessels (2005) ,para. 7.207. Note, however, that the Appellate Body found in *US/Canada – Continued Suspension (2008)* that statements made in the DSB regarding the WTO consistency of measures of other Members are 'generally diplomatic or political in nature' and 'do not have the legal status of a definitive determination in themselves'. See Appellate Body Report, *US/Canada –*

It has been argued that concerns regarding unilateral action taken by the United States against what it considered to be violations of GATT law were the driving force behind the Uruguay Round negotiations on dispute settlement, which eventually resulted in the DSU. During the 1980s, the United States increasingly took unilateral action against purported GATT violations by other countries. The United States did so under Section 301 of the Trade Act of 1974, and, with the adoption of the Trade and Competitiveness Act of 1988, the United States considerably expanded its ability to take such unilateral action.

Many other countries considered this unilateral action to be a form of 'vigilante justice' and demanded that the United States cease to act unilaterally against purported violations of GATT law. The United States, however, argued that the existing GATT dispute settlement system was too weak to protect US trade interests effectively. [141]

Robert Hudec noted:
"This United States counter-attack against the procedural weaknesses of the existing dispute settlement system led other governments to propose a deal. In exchange for a US commitment not to employ its Section 301-type trade restrictions, the other GATT governments would agree to create a new and procedurally tighter dispute settlement system that would meet US complaints."[142]

In this way, agreement was eventually reached on the current WTO dispute settlement system. It is unlikely that without, on the one hand, the frustration of the United States with the GATT dispute settlement system and, on the other hand, the concerns of other "***GATT CONT RACT ING PART IES"*** about US unilateralism in international trade disputes, the Uruguay Round negotiators would ever have been able to agree on a dispute settlement system as far-reaching, innovative and effective as the current WTO system.

Continued Suspension (2008), para.398. The Appellate Body also found that, by maintaining the suspension of concessions authorised by the DSB after the European Communities had notified an implementation measure, the United States and Canada were not seeking redress of a violation

[141] This weakness was primarily the result of the requirement that panel reports had to be adopted by consensus to become legally binding.

[142] R. E. Hudec, 'The New WTO Dispute Settlement Procedure', *Minnesota Journal of Global Trade*, 1999, 13

4.4 Preference for mutually acceptable solutions

Article 3.7 of the DSU states, in relevant part:
"*The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."*[143]

The DSU thus expresses a clear preference for solutions mutually acceptable to the parties reached through negotiations, rather than solutions resulting from adjudication. In other words, the DSU prefers parties *not* to go to court, but to settle their dispute amicably out of court. Accordingly, each dispute settlement process must start with consultations (or an attempt to have consultations) between the parties to the dispute.[144]

To resolve disputes through consultations is obviously cheaper and more satisfactory for the long-term trade relations with the other party to the dispute than adjudication by a panel. Note, however, that any mutually agreed solution reached through consultations needs to be consistent with WTO law,[145]and must be notified to the DSB, where any Member may raise any point relating thereto.[146]

For a further discussion on consultations and mutually agreed solutions, refer to sub-section 6.2 of this chapter on the process of WTO dispute settlement.[147]

[143]World Trade Law: Text, Material and Commentary, Simon & Bryan Mercurio With Arwel and Kara Leithner, 2010, 1st Print.
[144]International Law, Oppenheim, 6th Edition
[145]John H. Jackson: International Economic law Series, The Oxford University Press, Published 2009
[146]Article 3.6 of the DSU.
[147] See ahead.

4.5 Mandate to clarify WTO provisions:

Article 3.2, second sentence, of the DSU states that the WTO dispute settlement system serves not only 'to preserve the rights and obligations of Members under the covered agreements', but also 'to clarify the existing provisions of those agreements'.

This sub-section discusses in turn:
(1) the scope and nature of this mandate to clarify, i.e. to interpret, the provisions of the covered agreements;

(2) the general rule of interpretation set out in Article 31 of the *Vienna Convention on the Law of Treaties;* and

(3) supplementary means of interpretation set out in Article 32 of the *Vienna Convention.*

4.5.1 Scope & Nature of the Mandate to clarify:

As stated above, Article 3.2, second sentence, of the DSU mandates the WTO dispute settlement system with the task of clarification of the existing provisions of the covered agreements. As the past eighteen years of WTO dispute settlement have shown, many provisions of the covered agreements are a master piece of 'constructive ambiguity'.[148]

There is, therefore, much need for clarification in particular dispute settlement proceedings. However, the scope and nature of this clarification mandate is circumscribed. Article 3.2, third sentence, provides:
"Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[148] It is often such 'constructive ambiguity' that allowed negotiators to conclude the negotiations and agree on the provisions of an agreement.

In the same vein, Article 19.2 of the DSU states:
"In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

While allowing the WTO dispute settlement system to clarify WTO law, Articles 3.2 and 19.2 explicitly preclude the system from adding to or diminishing the rights and obligations of Members. The DSU thus explicitly cautions against 'Judicial activism'. WTO panels and the Appellate Body are not to take on the role of 'legislator'.[149]

Pursuant to Article IX:2 of the *WTO Agreement*, it is the exclusive competence of the Ministerial Conference and the General Council to adopt 'authoritative' interpretations of the provisions of the *WTO Agreement* and the Multilateral Trade Agreements.[150]

Article 3.9 of the DSU stipulates that the provisions of the DSU are without prejudice to the rights of Members to seek such 'authoritative' interpretation.

In *US – Certain EC Products(2001)*, the Appellate Body held:
"Determining what the rules and procedures of the DSU ought to be is not our responsibility or the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO."[151]

Note that, in *Chile – Alcoholic Beverages (2000)*, Chile argued before the Appellate Body "that the panel had acted inconsistently with Articles 3.2 and 19.2 of the DSU as it had added to the rights and obligations of Members."

The Appellate Body found, however that:

[149]WTO Members losing a dispute sometimes raise accusations of judicial activism. By way of example, note the reaction of Sander Levin, a senior US Congressman from Michigan, to the Appellate Body report in US – Zeroing (Japan) (2007) that 'the Appellate Body was overstepping its mandate, "changing the rules in the middle of the game"' and that 'the Appellate Body is required to apply obligations that the United States and other WTO Members have negotiated – not create obligations out of thin air'. See Bridges Weekly Trade News Digest, 17 January 2007. Likewise, United States Trade Representative Ron Kirk reacted to some adverse findings in the Appellate Body report in US – Anti-Dumping and Countervailing Duties (China) (2011) as follows: 'I am deeply troubled by this report. It appears to be a clear case of overreaching by the Appellate Body. We are reviewing the findings closely in order to understand fully the triplications.'

[150]For a discussion on Article IX:2 of the WTO Agreement, see above, p. 139.
[151]Appellate Body Report, US – Certain EC Products (2001), para. 92.

"*we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements.*[152]

For panels and the Appellate Body to stay within their mandate to clarify existing provisions, it is therefore important that they interpret and apply the provisions concerned correctly.

Article 3.2 of the DSU explicitly states "*in this respect that the dispute settlement system serves: to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law*".[153]

A correct interpretation of a WTO provision is thus an interpretation in accordance with customary rules of interpretation of public international law.

In its very first report, the report in *US – Gasoline (1996),* the Appellate Body noted with regard to the general rule of interpretation in Article 31 of the *Vienna Convention*:
This 'general rule of interpretation' [set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the [WTO agreements].[154]

In its second report, the report in *Japan – Alcoholic Beverages II (1996)*, the Appellate Body added:
"There can be no doubt that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status of a rule of customary international law."[155]

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[152] Appellate Body Report, Chile – Alcoholic Beverages (2000), para. 79.
[153] ibid
[154] Appellate Body Report, US – Gasoline (1996), 15–16.294
[155] Appellate Body Report, Japan – Alcoholic Beverages II (1996), 104. Also the rule reflected in Article 33 of the *Vienna Convention* regarding plurilingual treaties has been used by panels and the Appellate Body in the interpretation of provisions of WTO agreements.
See e.g. Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China) (2011)*, paras.330–2. Other customary rules or principles of interpretation which panels and/or the Appellate Body have already had recourse to (or at least discussed) are the *in dubiomitius* rule (see *EC – Hormones (1998)* and *China – Publications and Audiovisual Products (2010))* and the *ejusdem generis* rule (see *US – COOL (2012)* and *US –Large Civil Aircraft (2nd complaint) (2012)*). See above, p. 57.

In accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* , panels and the Appellate Body interpret provisions of the covered agreements in accordance with the ordinary meaning of the words of the provision in their context and in light of the object and purpose of the agreement involved; and, if necessary and appropriate, they have recourse to supplementary means of interpretation. While the mandate of panels and the Appellate

Body to clarify the provisions of the covered agreements is – as discussed above – limited by Articles 3.2 and 19.2 of the DSU and 'judicial activism' is not condoned, note that the Appellate Body held in *Japan – Alcoholic Beverages II (1996)* with regard to the degree of 'flexibility' and 'interpretability' of the covered agreements that:

WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.[156]

As the Appellate Body's interpretation of the term 'exhaustible natural resources' of Article XX(g) of the GATT 1994in *US – Shrimp (1998)* demonstrated, the meaning of a term may evolve over time.[157]

An 'evolutionary' interpretation of terms and provisions of WTO law is not excluded. With regard to one of the most controversial interpretations of the Appellate Body, namely, the interpretation of there Levant provisions of the *Anti-Dumping Agreement* which led the Appellate Body to rule that the United States' zeroing methodology is WTO-inconsistent,[158]one of the Members of the Appellate Body in *US – Continued Zeroing (2009)* stated in a concurring opinion

The interpretation of the covered agreements requires scrupulous adherence to the disciplines of the customary rules of interpretation of public international law … Just as the interpreter of a treaty strives for coherence, there is an inevitable recognition that a treaty bears the imprint of many hands. And what is left behind is a text, sometimes negotiated to a point where an agreement to regulate a matter

[156]Appellate Body Report, *Japan – Alcoholic Beverages II (1996)*, 122–3.
[157]For a discussion of this interpretation of the term 'exhaustible natural resources', see below, pp. 565–6.
[158]On the zeroing methodology to calculate a dumping margin, see below, p. 692.

could only be reached on the basis of constructive ambiguity, carrying both the hopes and fears of the parties. Interpretation is an endeavour to discern order, notwithstanding these infirmities, without adding to or diminishing the rights and obligations of the parties.[159]

4.5.2 Article 31 of the Vienna Convention:

Article 31 of the *Vienna Convention on the Law of Treaties*, entitled 'General Rule of Interpretation', and states in its first paragraph:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

As the panel in *US – Section 301 Trade Act (2000)* observed:
"Text, context and object-and-purpose correspond to well establish textual, systemic and teleological methodologies of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties. For pragmatic reasons the normal usage, and we will follow this usage, is to start the interpretation from the ordinary meaning of the 'raw' text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose."

However, the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order. Context and object-and purpose may often appear simply to confirm an interpretation seemingly derived from the 'raw' text. In reality it is always some context, even if unstated, that determines which meaning is to be taken as 'ordinary' and frequently it is impossible to give meaning, even 'ordinary meaning', without looking also at object-and-purpose.[160]

The panel in *US – Section 301 Trade Act (2000)* thus stressed that the elements of Article 31 of the *Vienna Convention* – "text, context and object-and-purpose – constitute 'one holistic rule of interpretation', and not 'a sequence of separate tests to be applied in a hierarchical order".[161]

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[159] Appellate Body Report, *US – Continued Zeroing (2009)*, para. 306.
[160] Panel Report, *US – Section 301 Trade Act (2000)*, para. 7.22.
[161] ibid

To determine the ordinary meaning of a term, it makes sense to start with the dictionary meaning of that term but, as the Appellate Body noted more than once, a term often has several dictionary meanings and dictionary meanings thus leave many interpretative questions open.[162]

The ordinary meaning of a term cannot be determined outside the context in which the term is used and without consideration of the object and purpose of the agreement at issue.[163]

In *Japan – Alcoholic Beverages II (1996)*, the Appellate Body stated:
"Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretive process: 'interpretation must be based above all upon the text of the treaty'. The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into accounting determining the meaning of its provisions."[164]

The duty of an interpreter is to examine the words of the treaty to determine the *common* intentions of the parties to the treaty.[165]
The panel in *US – Corrosion-Resistant Steel Sunset Review (2004)* declined to consider Japan's arguments regarding the object and purpose of the *Anti-Dumping Agreement* on the basis that:

Article 31 of the *Vienna Convention* requires that the text of the treaty be read in light of the object and purpose of the treaty, not that object and purpose alone override the text.[166]

One of the corollaries of the 'general rule of interpretation' of Article 31 of the *Vienna Convention* is that interpretation must give meaning and effect to *all* the terms of a treaty (i.e. the interpretative principle of effectiveness).
An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[167]

[162]Appellate Body Report, Canada – Aircraft (1999), para. 153; and Appellate Body Report, EC – Asbestos (2001), para. 92
[163]On the concept of 'ordinary meaning', see also Appellate Body Report, EC – Chicken Cuts (2005), paras.
[164]Appellate Body Report, Japan – Alcoholic Beverages II (1996), 104
[165]Appellate Body Report, India – Patents (US) (1998), para. 45; and Appellate Body Report, EC – Computer Equipment (1998), para. 84. Note that, in both these cases, the Appellate Body rejected the relevance of the 'legitimate expectations' of one of the parties in the interpretation of the meaning of the provision at issue.
[166]Panel Report, US – Corrosion-Resistant Steel Sunset Review (2004), para. 7.44.
[167]Appellate Body Report, US – Gasoline (1996), 21. See also e.g. Canada – Dairy (1999), para. 135

Furthermore, the Appellate Body in *EC – Hormones (1998)* cautioned interpreters as follows:
"The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words the interpreter may feel should have been used."[168]

In *India – Patents (US) (1998)*, the Appellate Body ruled that "*the principles of treaty interpretation 'neither require nor condone' the importation into a treaty of 'words that are not there' or 'concepts that were not intended'.*[169]

As stated above, the words used must be interpreted in their context. In fact, the ordinary meaning of the words used can often only be determined when considered in their context.

As Article 31.2 of the *Vienna Convention* states, the relevant context includes, in addition to the rest of the text of the agreement, the Preamble and annexes, also:

(1) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty:
(see Article 31.2(a)); and
(2) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In *EC – Chicken Cuts (2005)*, the Appellate Body found that
"the *Harmonized Commodity Description and Coding System*, commonly referred to as the '*Harmonized System*' and discussed in serves as 'context' within the meaning of Article31.2(a) of the *Vienna Convention* for the purpose of interpreting the WTO agreements."[170]

[168] Appellate Body Report, *EC – Hormones (1998)*, para. 181. 295
[169] Appellate Body Report, *India – Patents (US) (1998)*, para. 45.
[170] Appellate Body Report, EC – Chicken Cuts (2005), paras. 197–9. Note, however, that, in US – Gambling (2005), the Appellate Body ruled that the panel in that case erred in categorising document W/120 and the 1993 Scheduling Guidelines as 'agreements' within the meaning of Article 31.2(a) of the Vienna Convention. Body Report, US – Gambling (2005), paras. 175–6.

The Appellate Body referred "to the 'close link' between the *Harmonized System* and the WTO and the 'broad consensus' among Members to use the *Harmonized System.*[171]Pursuant to Article 31.3 of the *Vienna Convention*, a treaty interpreter must take into account together with the context:

(1) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (see Article 31.3(a));
(2) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (see Article 31.3(b)); and
(3) any relevant rules of international law applicable in the relations between the parties (see Article 31.3(c)). It is important to note the mandatory nature of Article 31.3. As the wording of its chapeau ('there shall be taken into account') indicates, Article
31.3 mandate a treaty interpreter to take into account subsequent agreements, subsequent practice and relevant rules of international law; it does not merely give a treaty interpreter the option of doing so.[172]

With regard to *subsequent agreements* within the meaning of Article 31.3(a), note that the Appellate Body considered in *US – Clove Cigarettes (2012)* that-
"a decision by the Ministerial Conference, namely, the Doha Ministerial Decision on Implementation-Related Issues and Concerns, and in particular paragraph 5.2 thereof, constituted a subsequent agreement between the parties, within the meaning of Article 31.3(a)."[173]

With regard to *subsequent practice* within the meaning of Article 31.3(b), the Appellate Body stated in *Japan –Alcoholic Beverages II (1996)*:

"In international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[174]

[171]Appellate Body Report, EC – Chicken Cuts (2005), paras. 197–9.
[172]Reports, EC – Approval and Marketing of Biotech Products (2006) ,para. 7.69. While the panel made this observation on the mandatory nature in particular with regard to Article 31.3(c), the same reasoning applies to the other paragraphs of Article 31.3.
[173]Appellate Body Report, US – Clove Cigarettes (2012), para. 268. With regard to the question whether a TBT Committee decision could be considered to be a 'subsequent agreement', see Appellate Body Report, US – Tuna II(Mexico) (2012), para. 372. See also above, p. 54, and below, p. 888.
[174]Appellate Body Report, *Japan – Alcoholic Beverages II (1996),* 105–6. See also above, p. 58; and Panel Report,

With regard to *relevant rules of international law* within the meaning of Article 31.3(c), the panel in *EC – Approval and Marketing of Biotech Products (2006)* noted:
Textually, this reference [to relevant rules of international law] seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say,

(i) international conventions (treaties),
(ii) international custom (customary international law), and
(iii) The recognized general principles of law.

In our view, there can be no doubt that treaties and customary rules of international law are 'rules of international law' within the meaning of Article 31(3)(c).[175]

Earlier, the Appellate Body had already held in *US – Shrimp (1998)* that general principles of international law are 'rules of international law' within the meaning of Article 31.3(c). [176]

However, the panel in *EC – Approval and Marketing of Biotech Products (2006)* pointed out that Article 31.3(c) of the *Vienna Convention* contains an important limitation, namely, that only those rules of international law 'applicable in the relations between the parties' are to be taken into account.
It held 'the parties' to mean those States that have consented to be bound by the treaty being interpreted (i.e. *all* WTO Members).[177]

According to the panel, a treaty interpreter is not *required* to have regard to treaties signed by only some WTO Members as context under Article 31.3(c) of the *Vienna Convention*, but would have the *discretion* to use such treaties as informative tools in establishing the ordinary meaning of the words used.[178]

US – FSC (2000), para. 7.75; Panel Report, *Canada – Patent Term (2000)*, para. 5.5 andpara. 6.89, footnote 48; and Appellate Body Report, *Chile – Price Band System (2002)*, para. 272.
[175]Panel Reports, *EC – Approval and Marketing of Biotech Products (2006)*, para. 7.67
[176]Appellate Body Report, *US – Shrimp (1998)*, para. 158
[177]Panel Reports, *EC – Approval and Marketing of Biotech Products (2006)*, para. 7.68.
[178] ibid

The panel's finding that 'rules of international law' within the meaning of Article 31.3(c) do not include treaties signed by only some WTO Members has been criticized by some international law scholars, who have noted that:

Bearing in mind the unlikeliest of a precise congruence in the membership of most important multilateral conventions, it would become unlikely that *any* use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law. In practice, the result would be the isolation of multilateral agreements as 'islands' permitting no References *inter se* in their application.[179]

Note, however, that the panel in *EC – Approval and Marketing of Biotech Products (2006)* did not rule that a treaty interpreter may not take into account treaties to which not all WTO Members are a party, but that a treaty interpreter is not required to do so.[180]

In *EC and certain member States – Large Civil Aircraft (2011)* , the Appellate Body ruled that an interpretation of 'the parties' in Article 31.3(c) should be guided by the Appellate Body's statement in *EC – Computer Equipment (1998)* that 'the purpose of treaty interpretation is to establish the common intention of the parties to the treaty'.
This suggests that one must exercise caution in drawing from an international agreement to which not all WTO Members are party.[181]

However, the Appellate Body also recognised in *EC and certain member States – Large Civil Aircraft (2011)* that a proper interpretation of the term 'the parties' must also take account of the fact that Article 31(3)(c) of the Vienna Convention is considered an expression of the 'principle of systemic integration' which, in the words of the International Law Commission, seeks to ensure that 'international obligations are interpreted by reference to their normative environment' in a manner that gives 'coherence and meaningfulness' to the process of legal interpretation.[182]

[179] International Law Commission, 58th Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission,finalised by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 471.
[180] Moreover, note that, in EC – Approval and Marketing of Biotech Products (2006) , not even all parties to the dispute, let alone all WTO Members, were parties to the non-WTO agreements at issue.
[181] Appellate Body Report, EC and certain member States – Large Civil Aircraft (2011), para. 845.

The Appellate Body therefore concluded in *EC and certain member States – Large Civil Aircraft (2011)* that:
"in a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members."[183]

In *EC and certain member States – Large Civil Aircraft (2011)*, *"the Appellate Body did not decide on whether the non-WTO agreement invoked by the European Union, namely, the 1992 Agreement between the European Community and the United States on trade in civil aircraft, was a 'rule of international law' within the meaning of Article 31.3(c)".*

The Appellate Body did not need to decide on this question since it determined that the 1992 Agreement was not a 'relevant' rule of international law. It was not a 'relevant' rule because it did not – contrary to what the European Union argued – concern the subject-matter of the WTO provision at issue.[184]

Finally, as discussed above, interpretation pursuant to Article 31 requires a treaty interpreter to consider the terms used 'in the light of the object and purpose' of the treaty.

With regard to the 'object and purpose', the Appellate Body agreed with the panel in *EC – Chicken Cuts (2005)*, that:
"the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994".[185]

Of particular interest in this case is that the Appellate Body emphasized that the starting point for ascertaining 'object and purpose' is the treaty itself, *in its entirety*, but that Article 31.1 did not exclude taking into account the object and

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[182] ibid
[183] ibid
[184] Appellate Body Report, *EC and certain member States – Large Civil Aircraft (2011)*, para. 845.
[185] Appellate Body Report, *EC – Chicken Cuts (2005)*, para. 243.

purpose of particular treaty provisions, if doing so assists the interpreter in determining the treaty's object and purpose on the whole.[186]

The Appellate Body did not consider it necessary 'to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or *vice versa*'.[187]

The Appellate Body stated:
"To the extent that one can speak of the 'object and purpose of a treaty provision', it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component."[188]

4.5.3 Article 32 of the Vienna Convention

Article 32 of the *Vienna Convention*, entitled 'Supplementary Means of Interpretation', states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a. leaves the meaning ambiguous or obscure; or
b. leads to a result which is manifestly absurd or unreasonable.

As the Appellate Body observed in *EC – Computer Equipment (1998)*, the application of the general rule of interpretation set out in Article 31 of the *Vienna Convention*, and discussed above, will usually allow a treaty interpreter to establish the meaning of a term. However, if that is not the case, Article 32 of the *Vienna Convention* allows a treaty interpreter to have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[189]

[186] ibid
[187] ibid
[188] ibid
[189] Appellate Body Report, *EC – Computer Equipment (1998)*, para. 86. See also Appellate Body Report, *Canada – Dairy (1999)*, para. 138.

A treaty interpreter may also have recourse to Article 32 in order to confirm, i.e. further support, the interpretation resulting from the application of the general rule of interpretation of Article 31.

With regard to the 'preparatory work of the treaty', commonly also referred to as the 'negotiating history' of a treaty, it must be noted that there exists no officially recorded negotiating history of the WTO agreements (unlike for the GATT 1947 and the 1948 *Havana Charter for an International Trade Organization*).[190]

It is, therefore, not surprising that panels and the Appellate Body have made little use of the 'preparatory work of the treaty' in their interpretative efforts.[191]

Panels and the Appellate Body have given limited weight to various country specific and often conflicting negotiating proposals and very little importance to the often contradictory and self-serving *personal* recollections of negotiators.

In *US – Line Pipe (2002)*, the Appellate Body noted that the 'negotiating history' of Article XIX of the GATT 1947 and of the WTO *Agreement on Safeguards* did not provide much guidance on the interpretative question at issue in that case.[192]

Note, however, that the panel in *US – Large Civil Aircraft (2nd complaint) (2012)* observed that a reference to governmental 'purchases of services' was initially included in the draft, but was removed from the final version, of Articles 1.1 and 14(d) of the *SCM Agreement*. The panel attached significance to this fact in its interpretation of these provisions.[193]

With regard to 'the circumstances of [the] conclusion' of a treaty, the Appellate Body considered in *EC – Computer Equipment (1998)*, that Article 32 permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated. In this case, the Appellate Body considered that the tariff classification practice in the European Communities during the Uruguay Round was part of 'the circumstances of [the] conclusion' of the *WTO Agreement*

[190]In *India – Quantitative Restrictions (1999)*, for example, the Appellate Body explicitly noted 'the absence of a record of the negotiations' on the 1994 WTO Understanding at issue in that case. See Appellate Body Report, *India Quantitative Restrictions (1999)*, para. 94.
[191]The Appellate Body referred to the negotiating history of the provision at issue in *Canada – Periodicals (1997)*. However, the negotiating history referred to was the negotiating history of the *Havana Charter*. See Appellate Body Report, *Canada – Periodicals (1997)*, 34.
[192]Appellate Body Report, *US – Line Pipe (2002)*, para. 175.
[193]Panel Report, *US – Large Civil Aircraft (2nd complaint) (2012)*, paras. 7.963–7.964.

and could therefore be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention.*[194]

In *EC – Poultry (1998)*, the Appellate Body considered a pre-WTO bilateral agreement between the parties to the dispute (i.e. the *Oilseeds Agreement*) to be part of the historical background to be taken into account when interpreting the provision at issue.[195]

In *US – Gambling (2005)*, the Appellate Body used two documents('Scheduling Guidelines') drawn up by the Secretariat during the Uruguay Round services negotiations to assist Members in drafting their GATS Schedules of Specific Commitments, as supplementary means of interpretation with regard to the United States' Services Schedule.[196]

4.6 Remedies for breach:

A. Withdrawal of WTO- Inconsistent measures.
B. WTO Remedies as LexSpecialis
C. Influence of Reparation in WTO Dispute Settlement
D. Compensation
E. Retaliation
F. Conclusion

Remedies in WTO Dispute Settlement

The DSU makes extensive provisions for the remedies available in WTO dispute settlement. These remedies are largely based on the past practice of GATT panels in awarding remedies: in GATT dispute settlement, the remedy was usually to secure the withdrawal of the measures concerned if these found to be inconsistent with General Agreement[197]. Significant difference can be found between the remedies awarded under the GATT and WTO dispute settlement system and those

[194] Appellate Body Report, *EC – Computer Equipment (1998)*, para. 92

[195] Appellate Body Report, *EC – Poultry (1998)*, para. 83. See also Appellate Body Report, *Canada – Dairy (1999)*, para. 139.

[196] Appellate Body Report, *US – Gambling (2005)*, para. 196. In this regard, the Appellate Body disagreed with the panel that these documents were part of the 'context' for interpretation of the United States' Schedule, under Article31.2(a) of the *Vienna Convention*. See also below, p. 528.

[197] Understanding Regarding Notification, Conclusion, Dispute Settlement and Surveillance- The World Trade Organization: Law, Practice and Policy (2nd Edition, 2006)

available under the law of reparation as applied by most other International Courts. In this sense, the remedial regime may be regarded in large measure as a special regime or lexspecialis.

A. Withdrawal of WTO- Inconsistent measures:[198]

Article 3.7, fourth sentence, of the DSU states:

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

Furthermore, Article 3.7, fifth sentence, suggests that the withdrawal of the WTO-inconsistent measure should normally be 'immediate'

Article 19.1 of the DSU provides:
"where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. Such a recommendation, once adopted by the DSB, is legally binding on the Member concerned"

With regard to recommendations and rulings adopted by the DSB, Article 21.1 of the DSU provides that:
"Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

While Article 3.7 of the DSU refers to the withdrawal of the measure found to be WTO-inconsistent, the withdrawal or the modification of the WTO inconsistent aspects or elements of such a measure usually suffices to bring the measure into conformity with WTO law pursuant to the recommendations or rulings of the DSB. Prompt or immediate compliance with the DSB recommendations and rulings, i.e. prompt or immediate withdrawal or modification of the WTO-inconsistent measure, is essential to the effective functioning of the WTO and is the primary obligation.[199]

[198] John H. Jackson: International Economic law Series, The Oxford University Press, Published 2009
[199] ibid

However, if it is impracticable to comply immediately with the recommendations and rulings, and this may often be the case, the Member concerned has, pursuant to Article 21.3 of the DSU, a reasonable period of time in which to do so.

The 'reasonable period of time for implementation' may be:
(1) agreed on by the parties to the dispute; or
(2) determined through binding arbitration at the request of either party.

In most cases – in particular in recent years – the parties to the dispute succeed in agreeing on what constitutes a 'reasonable period of time for implementation'.

In seventy-four cases to date, the parties were able to agree on the reasonable period of time for implementation.

The period agreed on ranges from four months and fourteen days (*US – Wheat Gluten (2001)*) to twenty-four months (*Dominican Republic – Import and Sales of Cigarettes (2005)*).
In twenty-six cases to date, the 'reasonable period of time for implementation' was decided through binding arbitration under Article 21.3(c) of the DSU.

The latter provision states:

In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

Since the Article 21.3(c) arbitration in *EC – Hormones (1998)*, it is generally accepted and clearly reflected in practice, that the fifteen-month period mentioned in Article 21.3(c) of the DSU is a mere guideline for the arbitrator and that it is neither an '*outer* limit' nor, of course, *a floor* or '*inner* limit' for a 'reasonable period of time for implementation'.
In *EC – Hormones (1998)*, the arbitrator ruled that the 'reasonable period of time for implementation', as determined under Article 21.3(c), should be:

the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB[200].

B. WTO Remedies as Lex Specials:

An initial difference between the WTO and other dispute settlement system, which affects the availability of remedies, lies in the 3 types of complaint that claimant states may make, namely:

1) Violation Complaints
2) Non-Violation Complaints
3) Situation Complaints

Each type of complaint relates to trade measures taken by other members who serve to "nullify" or "impair" any benefits which should accrue to it directly or indirectly under the covered agreements[201]. The concepts of 'nullification and "impairment" are specific to GATT and WTO dispute settlement and are not conterminous with breaches of treaty obligations. The concepts where originally intended as procedural rules providing for legal remedies not only in case of treaty violations but also in situations where the commercial opportunities protected by those trade agreements were being nullified by other measures[202]. So there is no need for there to be a breach of a an obligation arising under a relevant treaty is considered prima facie to constitute a case of nullification or impairment.

- (1) "Violation Complaints" under article XXIII(1)(a) of GATT 1994 are, as might be expected, complaints that treaty obligations arising under the GATT have been breached. The DSU extends the reach of article XXIII(1)(a) to all covered agreements under the article 3(8), the infringement o f obligation under any covered agreements is considered prima facie to constitute a case of nullification and

[200] ibid
[201] General Agreement on Tariffs and Trade, 1994.
[202] The GATT/WTO Dispute Settlement System (1997)142-3.

impairment[203]. A violation of complaint can be done when not only harm is done to the economy of another member state, but simply when a trade measure is introduced which could cause harm as well. This was clarified by WTO panel in US—section 301- 310 Trade Act.

- (2) "Non- Violation Complaints" are provided for in article XXIII(1) (b) of the GATT1994. Under article 26 of the DSU where article XXIII(1) (b) is applicable to a covered agreement, a WTO panel can make rulings or recommendations when a party considers that benefit or impaired. Thus, non-violations complaints are very rare, as noted by the panel in Japan film, which observed that there had only been eight such claims in GATT and WTO practice. The panel stated that this suggested "that both the GATT contracting parties and WTO Members have approached this remedy with caution and indeed, have treated it as an exceptional instrument of dispute settlement[204].
- (3) Finally, "Situation Complaints" are contemplated in article XXIII(1)(c) of the GATT1994, and can be brought in respect of all covered agreement due to the operation of article 26(2) of DSU[205]. A situation complaint involves an allegation of nullification or impairment of benefits which has not resulted from a violation complaint or non-violation complaint. This provision is invoked very infrequently, and there have been no situation complaint which has resulted in GATT or WTO jurisprudence[206].

As well as there are 3 types of complaints in WTO dispute settlement the remedies available for each complaint differs. In case of "violation complaints, article 3(7) of the DSU establishes a hierarchy of remedies; it stipulates that the first objective of the dispute settlement system is usually to secure the "withdrawal of the measures concerned" if these are found to be inconsistent with the provisions of any covered agreements. The primary objective is reinforced by the recommendations that panels or the Appellate Body shall make under article 19(1)

[203]DSU, art 3(8), Dispute settlement in World Trade Organisation, by David Palmeter and Peter Mavroidis, 2nd Edition, 2004.
[204]Palmeter and Mavroidis, Dispute Settlement in the World Trade Organization, 1st Ed, 1997.
[205] Ibid.
[206] WTO, WTO Analytical Index. Guide to WTO Law & Practice (2003) 382. Para 3.

which are that the member concerned bring the measures into conformity with the agreement. Another remedy contemplated in article 3(7) is "compensation", which is to be invoked "only if the immediate withdrawal of the measure which is impracticable and as a temporary measures pending withdrawal of measure which is inconsistent with a covered agreement[207].

But "compensation" under WTO law does not mean the same meaning as in general international law[208]. WTO compensation is not "an indemnity payment to repair damage or harm caused by an unlawful act", but is rather a prospective measures, since it offers relief for harm that the complainant will probably suffer pending the implementation and negotiations with a view to develop mutually acceptable compensation and might entail for concessions in the form of greater market access. If no satisfactory concession is agreed upon 20 days, the claimant state may request from DSB to invoke third remedy available under DSU, being the "suspension of concession" or other obligation under the covered agreement to the members concerned.

For instance:

- In EC--- Hormones, the US and Canada requested authorization from the DSB to suspend the concession to the EC in the order of US $116.8 million and CAN$ 11.3 million per year respectively[209], this was duly granted.

WTO disputes can also be referred to arbitration, which available as alternate means to WTO dispute settlement under article 25 of the DSU. However the WTO arbitration tribunals are limited by the terms of article 3(7).

In case of "non-violation complaints", the remedies available are different. If a claim is successful, there is no obligation on the member to withdrawal the measures, as non violations complaint does not breach the WTO agreement. In such case the panel or the Appellate body merely has the power to recommend that the members concerned make a mutually satisfactory adjustment[210].

[207] Art 3(7)
[208] David Palmeter and Petros Mavroidis, Dispute Settlement in the WTO, 1st eg, 1999.
[209] EC- Hormones (US), WTDS25/21 (15TH July, 1999)
[210] Article 26(1) (b)

In case of "situation violation", which, like non-violation complaints, so not involves an internationally wrongful act, any panel report, including any recommendations and ruling, must be adopted by consensus[211]. This contrast with the position applicable in the adoption of panel reports in violation and non-violation complaints which is the negative consensus rule: i.e. the report is adopted unless there is a consensus not to do so.

C. **Influence of Reparation in WTO Dispute Settlement**:

Despite the fact that the nature of WTO remedies, it is suggested that the law of reparation, including the concept that reparation should "wipe out the entire illegal act", this is nonetheless relevant to GATT and WTO dispute settlement[212]. Parties to WTO also tested the perspective nature of WTO remedies in several cases by requesting retroactive remedies. The issue was raised but not decided in 2 disputes: Guatemala-Cement I, and Brazil-Aircraft.

The issue arose again in Australia- Leather, a case concerning prohibited subsidies[213]. In this case US alleged that the Australia was providing subsidies prohibited by the SCM Agreement to an Australian producer and exporter of automotive leather. The panel found that the Australian subsidies were inconsistent with the SCM Agreement and recommended that Australia withdraw them without any delay.

A panel was established to examine Australia's implementation of the recommendation and both USA & Australia argued that article 4(7) of SCM Agreement, which provides that panels shall recommend that offending subsidies be withdrawn without delay, was limited to purely prospective action[214]. The panel disagreed, and held that the phrase "withdrawal of the subsidy" in article 4(7) of the SCM Agreement could also entail repayment of prohibited subsidies and therefore constituted corrective measures with retrospective effect.

On the basis of these panel reports, it is suggested that the obligation on states responsible for an internationally wrongful act to make reparation has some

[211] DSU, ART 26(2): Decision of 12th April 1989 on Improvements to the GATT Dispute Settlement Rules.
[212] Unity and Diversity in International Law (2006) 437.
[213] DSR 1999-III, 951 (PR)
[214] Australia- Leather, DSR 2000-III, 1189,1200-3(PR)

relevance in the awarding of remedies in WTO dispute settlement, where the DSU and the relevant covered agreement leave gaps to be filled.

D. Compensation

As noted above, only the withdrawal (or modification) of the WTO-inconsistent measure constitutes a final remedy for breach of WTO law. However, if a Member has not withdrawn or modified the WTO-inconsistent measure by the end of the 'reasonable period of time for implementation', the DSU provides for the possibility of recourse to *temporary* remedies, namely:
(1) compensation; or
(2) suspension of concessions or other obligations, commonly referred to as 'retaliation'. This sub-section briefly deals with the less important – and hardly used – of the two temporary remedies, namely, compensation.

Compensation within the meaning of Article 22 of the DSU is: (1) voluntary, i.e. the complainant is free to accept or reject compensation; and (2) forward looking, i.e. the compensation concerns only the nullification nor impairment (i.e. the harm) that will be suffered in the future.

Compensation must be consistent with the covered agreements. To date, parties have been able to agree on compensation in very few cases.
In *Japan – Alcoholic Beverages II (1996),* for example, the parties agreed on compensation which took the form of temporary, additional market access concessions for certain products of export interest to the original complainants.

E. Retaliation

Retaliation measures are by nature *trade destructive* and the complaining party imposing these measures is also negatively affected by them. In particular, for developing-country Members, applying retaliation measures is often not a genuine option.

In *EC – Bananas III (1997),* Ecuador was authorized to (cross-)retaliate for an amount of US$201.6million per year but found it impossible to make use of this possibility without causing severe harm to its own economy.

This and later cases, especially cases involving developing-country complainants, have given rise to doubts as to the effectiveness of retaliation as a (temporary) remedy for breach of WTO law.

However, in *EC – Bananas III (1997)* and in *US – FSC (2000)*, the retaliation measures imposed by the United States on the European Communities and imposed by the European Communities on the United States respectively, have arguably led to some degree of compliance with the recommendations and rulings in those disputes

F. Conclusion:

The remedial regime applicable in WTO dispute settlement under the DSU is a lexspecialis, and differs from the law of reparation in several respects, including its goal of prospective compliance with the obligations under the WTO agreements and the non-availability of retroactive remedies to compensate the injured state for past harm. Some GATT and WTO practice suggest that the WTO remedial regime might not be hermetically sealed and impervious to the influence of the obligation to make reparation under general international law.

An overall conclusion is that while there is general agreement among international courts on the availability of the different forms of reparation as judicial remedies, there is less common practice in what international courts are prepared to award- in particular, the varying standards of compensation and the availability of mandatory orders and the regime of remedies in the WTO dispute settlement system forms a distinct lexspeicalis, albeit one which might be susceptible to the influence of the general international law on reparation. There is in this sense les common ground than has been encountered I other cases such as applicable rules of evidence and the power to grant provisional measures.

Chapter 5.

Institutions of WTO Dispute Settlement

(i) A unique Contribution
(ii) Principles : Equitable, fast, effective, mutually acceptable
(iii) Panels
(iv) How are the disputes settled?
(v) How long to settle the dispute?
(vi) Flow Chart.
(vii) The Case has been decided what next?
(viii) Case Law.

The priority is to settle disputes, not to pass judgment[215]

(i) A unique contribution:

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.[216]

However, the point is not to pass judgment. The priority is to settle disputes, through consultations if possible. By January 2008, only about 136 of the 369 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995.

(ii) Principles: equitable, fast, effective, mutually acceptable[217]

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments. A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.
A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible

[215] William J. Davey
[216] www.wto.org > trade topics > dispute settlement
[217] Ibid

deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible the Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view. Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.[218]

(iii) Panels[219]

Panels are like tribunals. But unlike in a normal tribunal, the panel lists are usually chosen in consultation with the countries in dispute. Only if the two sides cannot agree does the WTO director-general appoint them. Panels consist of three (possibly five) experts from different countries who examine the evidence and decide who is right and who is wrong. The panel's report is passed to the Dispute Settlement Body, which can only reject the report by consensus. Panel lists for each case can be chosen from a permanent list of well-qualified candidates, or from elsewhere. They serve in their individual capacities. They cannot receive instructions from any government.

[218] Ibid
[219] www.wto.org

(iv) How are disputes settled?[220]

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

Various stages are listed as below:

(i) First stage: consultation (up to 60 days).

Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.

(ii) Second stage: the panel (up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude).

If consultations fail, the complaining country can ask for a panel to be appointed. The country "in the dock" can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).

Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel's report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited
The panel's final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.[221]

[220] Ibid
[221] Ibid

The agreement describes in some detail how the panels are to work. The main Stages are:

Before the first hearing: each side in the dispute presents its case in writing to the panel.

- **First hearing**: the case for the complaining country and defense: the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.

- **Rebuttals**: the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.

- **Experts**: if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.[222]

    - **First draft**: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

    - **Interim report:** The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.

    - **Review:** The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.

    - **Final report:** A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.

[222] Ibid

- **<u>The report becomes a ruling</u>**: The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

- **<u>Appeals:</u>**

Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues.[223]

Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

The Dispute Settlement Body has to accept or reject the appeals report within 30 days

— and rejection is only possible by consensus.[224]

[223] www.wto.org > trade topics > dispute settlement

[224] Ibid

(v) How long to settle a dispute?

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.[225]

- 60 days : Consultations, mediation, etc
- 45 days : Panel set up and panel lists appointed
- 6 months: Final panel report to parties
- 3 weeks: Final panel report to WTO members
- 60 days: Dispute Settlement Body adopts report (if no appeal)
- Total = 1 year (without appeal)
- 60–90 days Appeals report
- 30 days Dispute Settlement Body adopts appeals Report
- Total = 1y 3m (with appeal)

[225] Ibid

(iii) ***WTO Dispute Settlement Flow Chart***

Consultation
(Members may request panel if no solution found within 60 days)

Good offices, conciliation or mediation by Director- General

DSB establishes panel
(No later than at 2nd DSB meeting)

Terms of reference
(Standard term unless special terms agreed within 20 days)
Composition
(To be agreed within 20days or decided by the Director- General)

Panel Examination
(In general not to exceed 6 months, 3 months in cases of urgency)
Meeting with parties **Meeting with 3rd parties**

Panel Submits reports to parties
Interim Review

Panel Circulates report to DSB

DSB adopts panel report (Within 60days unless appealed)	**Appellate Review** (Not to exceed 90 days)

DSB adopts Appellate Reports
(Within 30 days)

DSB monitors Implementation of adopted panel/Appellate Body recommendations
(To be implemented within reasonable period of time)

Parties negotiate compensation pending full implementation	**DSB authorises retaliation pending full implementation** (60 days after expiry of reasonable period of time)

(iv) The case has been decided: what next?

Go directly to jail. Do not pass Go, do not collect.... Well, not exactly. But the sentiments apply. If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.

Even once the case has been decided, there is more to do before trade sanctions (the conventional form of penalty) are imposed. The priority at this stage is for the losing "defendant" to bring its policy into line with the ruling or recommendations.

The dispute settlement agreement stresses that "prompt compliance with recommendations or rulings of the DSB [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members".

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeal report. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption.

If complying with the recommendation immediately proves impractical, the member will be given a "reasonable period of time" to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. The Dispute Settlement Body must grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions

spilling over into unrelated sectors while at the same time allowing the actions to be effective.

In any case, the Dispute Settlement Body monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

(v) Case Study: The Timetable in practice.[226]

On 23 January 1995, Venezuela complained to the Dispute Settlement Body that the United States was applying rules that discriminated against gasoline imports, and formally requested consultations with the United States. Just over a year later (on 29 January 1996) the dispute panel completed its final report. (By then, Brazil had joined the case, lodging its own complaint in April 1996. The same panel considered both complaints.) The United States appealed. The Appellate Body completed its report, and the Dispute Settlement Body adopted the report on 20 May 1996, one year and four months after the complaint was first lodged.

The United States and Venezuela then took six and a half months to agree on what the United States should do. The agreed period for implementing the solution was 15 months from the date the appeal was concluded (20 May, 1996 to 20 August, 1997).
The case arose because the United States applied stricter rules on the chemical characteristics of imported gasoline than it did for domestically-refined gasoline. Venezuela (and later Brazil) said this was unfair because US gasoline did not have to meet the same standards — it violated the "national treatment" principle and could not be justified under exceptions to normal WTO rules for health and environmental conservation measures. The dispute panel agreed with Venezuela and Brazil. The appeal report upheld the panel's conclusions (making some changes to the panel's legal interpretation). The United States agreed with Venezuela that it would amend its regulations within 15 months and on 26 August 1997 it reported to the Dispute Settlement Body that a new regulation had been signed on 19 August

[226] www.wto.org > trade topics > dispute settlement

Chapter 6.

Cross cutting and New Issues

1. Regionalism : Friends or Rivals

(i) The WTO's work is not confined to specific agreements with specific obligations.
(ii) Regional Agreements

2. The Environment Special Concerns:

(i) WTO and Environment Agreement their relation?
(ii) Green Provisions
(iii) Case Studies
(iv) Other Provisions
(v) Questions

3. Investment, Competition, procurement and simple process
4. Electronic Commerce
5. Labour Standards

1. **Regionalism:**

(i) The WTO's work is not confined to specific agreements with specific obligations.

Member governments also discuss a range of other issues, usually in special committees or working groups. Some are old; some are new to the GATT-WTO system. Some are issues in their own right, some cut across several WTO topics. Some could lead to negotiations.[227]

They include:

Regional economic groupings

- *Trade and the environment*
- *Trade and investment*
- *Competition policy*
- *Transparency in government procurement*
- *Trade "facilitation"*
- *Electronic commerce*
- *Trade and labour rights*:

Regionalism: friends or rivals?

The European Union, the North American Free Trade Agreement, the Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Common Market of the South (MERCOSUR), the Australia-New Zealand Closer Economic Relations Agreement, and so on.

By July 2005, only one WTO member — Mongolia — was not party to a regional trade agreement. The surge in these agreements has continued unabated since the early 1990s. By July 2005, a total of 330 had been notified to the WTO (and its predecessor, GATT). Of these: 206 were notified after the WTO was created in January 1995; 180 are currently in force; several others are believed to be operational although not yet notified. One of the most frequently asked question is whether these regional groups help or hinder the WTO's multilateral trading system. A committee is keeping an eye on development.[228]

[227] www.wto.org > trade topics > goods> regional trade agreements

[228] www.wto.org > trade topics > goods> regional trade agreements

(ii) Regional Trading Agreements:

They seem to be contradictory, but often regional trade agreements can actually support the WTO's multilateral trading system. Regional agreements have allowed groups of countries to negotiate rules and commitments that go beyond what was possible at the time multilaterally. In turn, some of these rules have paved the way for agreement in the WTO. Services, intellectual property, environmental standards, investment and competition policies are all issues that were raised in regional negotiations and later developed into agreements or topics of discussion in the WTO.[229]

The groupings that are important for the WTO are those that abolish or reduce barriers on trade within the group. The WTO agreements recognize that regional arrangements and closer economic integration can benefit countries. It also recognizes that under some circumstances regional trading arrangements could hurt the trade interests of other countries.[230]

Normally, setting up a customs union or free trade area would violate the WTO's principle of equal treatment for all trading partners ("most-favoured-nation"). But GATT's Article 24 allows regional trading arrangements to be set up as a special exception, provided certain strict criteria are met. In particular, the arrangements should help trade flow more freely among the countries in the group without barriers being raised on trade with the outside world. In other words, regional integration should complement the multilateral trading system and not threaten it.

Article 24 says if a free trade area or customs union is created, duties and other trade barriers should be reduced or removed on substantially all sectors of trade in the group. Non-members should not find trade with the group any more restrictive than before the group was set up.

Similarly, Article 5 of the General Agreement on Trade in Services provides for economic integration agreements in services. Other provisions in the WTO agreements allow developing countries to enter into regional or global agreements that include the reduction or elimination of tariffs and non-tariff barriers on trade among themselves.[231]

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[229] Ibid

[230] Ibid

[231] www.wto.org > trade topics > goods> regional trade agreements

On 6 February 1996, the WTO General Council created the Regional Trade Agreements Committee.

Its purpose is to examine regional groups and to assess whether they are consistent with WTO rules. The committee is also examining how regional arrangements might affect the multilateral trading system, and what the relationship between regional and multilateral arrangements might be.[232]

2. The Environment Special Concerns[233]

The WTO has no specific agreement dealing with the environment. However, the WTO agreements confirm governments' right to protect the environment, provided certain conditions are met, and a number of them include provisions dealing with environmental concerns. The objectives of sustainable development and environmental protection are important enough to be stated in the preamble to the Agreement Establishing the WTO.

The increased emphasis on environmental policies is relatively recent in the 60-year history of the multilateral trading system. At the end of the Uruguay Round in 1994, trade ministers from participating countries decided to begin a comprehensive work programme on trade and environment in the WTO. They created the Trade and Environment Committee.

This has brought environmental and sustainable development issues into the mainstream of WTO work. The 2001 Doha Ministerial Conference kicked off negotiations in some aspects of the subject.

(i) WTO and Environment Agreement their relation?

How do the WTO trading system and "green" trade measures relate to each other? What is the relationship between the WTO agreements and various international environmental agreements and conventions?

[232] www.wto.org > trade topics >services > regional trade agreements
[233] Ibid

There are about 200 international agreements (outside the WTO) dealing with various environmental issues currently in force. They are called multilateral environmental agreements (MEAs).[234]

About 20 of these include provisions that can affect trade: for example they ban trade in certain products, or allow countries to restrict trade in certain circumstances. Among them are the Montreal Protocol for the protection of the ozone layer, the Basel Convention on the trade or transportation of hazardous waste across international borders, and the Convention on International Trade in Endangered Species (CITES).[235]

Briefly, the WTO's committee says the basic WTO principles of non discrimination and transparency do not conflict with trade measures needed to protect the environment, including actions taken under the environmental agreements. It also notes that clauses in the agreements on goods, services and intellectual property allow governments to give priority to their domestic environmental policies.[236]

The WTO's committee says the most effective way to deal with international environmental problems is through the environmental agreements. It says this approach complements the WTO's work in seeking internationally agreed solutions for trade problems. In other words, using the provisions of an international environmental agreement is better than one country trying on its own to change other countries' environmental policies (see shrimp-turtle and dolphin-tuna case studies).[237]

The committee notes that actions taken to protect the environment and having an impact on trade can play an important role in some environmental agreements, particularly when trade is a direct cause of the environmental problems. But it also points out that trade restrictions are not the only actions that can be taken, and they are not necessarily the most effective. Alternatives include: helping countries acquire environmentally-friendly technology, giving them financial assistance, providing training, etc.

The problem should not be exaggerated. So far, no action affecting trade and taken

[234] www.wto.org > trade topics > environment
[235] Ibid
[236] Ibid
[237] Ibid

under an international environmental agreement has been challenged in the GATT-WTO system. There is also a widely held view that actions taken under an environmental agreement are unlikely to become a problem in the WTO if the countries concerned have signed the environmental agreement, although the question is not settled completely. The Trade and Environment Committee is more concerned about what happens when one country invokes an environmental agreement to take action against another country that has not signed the environmental agreement.[238]

A question arises that various Disputes which arise from them how shall they be handle??

Suppose a trade dispute arises because a country has taken action on trade (for example :imposed a tax or restricted imports) under an environmental agreement outside the WTO and another country objects. Should the dispute be handled under the WTO or under the other agreement?
The Trade and Environment Committee says that if a dispute arises over a trade action taken under an environmental agreement, and if both sides to the dispute have signed that agreement, then they should try to use the environmental agreement to settle the dispute. [239]

But if one side in the dispute has not signed the environment agreement, then the WTO would provide the only possible forum for settling the dispute. The preference for handling disputes under the environmental agreements does not mean environmental issues would be ignored in WTO disputes. The WTO agreements allow panels examining a dispute to seek expert advice on environmental issues.[240]

[238] WTO and Environment Aspects.
[239] JH Jackson, The World Trade Organization, 1999,ed1.
[240] Ibid

(ii) 'Green' provisions[241]

Examples of provisions in the WTO agreements dealing with environmental issues

• GATT Article 20: policies affecting trade in goods for protecting human, animal or plant life or health are exempt from normal GATT disciplines under certain conditions.

• Technical Barriers to Trade (i.e. product and industrial standards), and Sanitary and sanitary Measures (animal and plant health and hygiene): explicit recognition of environmental objectives.

• Agriculture: environmental programmes exempt from cuts in subsidies.

• Subsidies and Countervail: allows subsidies, up to 20% of firms' costs, for adapting to new environmental laws.

• Intellectual property: governments can refuse to issue patents that threaten human, animal or plant life or health, or risk serious damage to the environment (TRIPS Article 27).

• GATS Article 14: policies affecting trade in services for protecting human, animal or plant life or health are exempt from normal GATS disciplines under certain conditions.[242]

[241] International Environment Protection Protocol: 1995.
[242] Ibid

(iii) Case Studies:

(a) The 'shrimp-turtle' case:[243]

This was a case brought by India, Malaysia, Pakistan and Thailand against the US. The appellate and panel reports were adopted on 6 November 1998. The official title is "United States — Import Prohibition of Certain Shrimp and Shrimp Products", the official WTO case numbers are 58 and 61.

Facts of the case:

Seven species of sea turtles have been identified. They are distributed around the world in subtropical and tropical areas. They spend their lives at sea, where they migrate between their foraging and nesting grounds.

Sea turtles have been adversely affected by human activity, either directly (their meat, shells and eggs have been exploited), or indirectly (incidental capture in fisheries, destroyed habitats, polluted oceans).

In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the US on the importation of certain shrimp and shrimp products. The protection of sea turtles was at the heart of the ban.

The US Endangered Species Act of 1973 listed as endangered or threatened the five species of sea turtles that occur in US waters, and prohibited their "take" within the US, in its territorial sea and the high seas. ("Take" means harassment, hunting, capture, killing or attempting to do any of these.)

Under the act, the US required US shrimp trawlers to use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles.

Section 609 of US Public Law 101–102, enacted in 1989, dealt with imports. It said, among other things, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US — unless the

[243] www.wto.org > trade topics > environment

harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.

In practice, countries that had any of the five species of sea turtles within their jurisdiction, and harvested shrimp with mechanical means, had to impose on their fishermen requirements comparable to those borne by US shrimpers if they wanted to be certified to export shrimp products to the US. Essentially this meant the use of Teds all time.

The Ruling:
"In its report, the Appellate Body made clear that under WTO rules, countries have the right to take trade action to protect the environment (in particular, human, animal or plant life and health and endangered species and exhaustible resources). The WTO does not have to "allow" them this right."

It also said measures to protect sea turtles would be legitimate under GATT Article 20 which deals with various exceptions to the WTO's trade rules, provided certain criteria such as non-discrimination were met.

The US lost the case, not because it sought to protect the environment but because it discriminated between WTO members. It provided countries in the western Hemisphere — mainly in the Caribbean — technical and financial assistance and longer transition periods for their fishermen to start using turtle-excluder devices. It did not give the same advantages, however, to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO.
The ruling also said WTO panels may accept "amicus briefs" (friends-of-the-court submissions) from NGOs or other interested parties.

(iv) <u>What we have not decided ...'This is part of what the Appellate Body said:</u>

In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO

or in other international flora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[244]

(v) <u>What we have decided in this appeal is simply this</u>:

although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX [i.e. 20] of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.

For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States — Gasoline [adopted 20May 1996, WT/DS2/AB/R, p. 30], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement."[245]

(b) **<u>A GATT dispute: The tuna-dolphin dispute</u>[246]**

This case still attracts a lot of attention because of its implications for environmental disputes. It was handled under the old GATT dispute settlement procedure.

<u>Key questions are: Issues of the case:</u>

• can one country tell another what its environmental regulations should be?
• do trade rules permit action to be taken against the method used to produce goods (rather than the quality of the goods themselves)?

[244] www.wto.org > trade topics > environment
[245] Ibid
[246] Ibid

Facts of the Case[247]

What was it all about?

In eastern tropical areas of the Pacific Ocean, schools of yellow fin tuna often swim beneath schools of dolphins. When tuna is harvested with purse seine nets, dolphins are trapped in the nets. They often die unless they are released. The US Marine Mammal Protection Act sets dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats catch yellow fin tuna in that part of the Pacific Ocean. If a country exporting tuna to the United States cannot prove to US authorities that it meets the dolphin protection standards set out in US law, the US government must embargo all imports of the fish from that country. In this dispute, Mexico was the exporting country concerned.

Its exports of tuna to the US were banned. Mexico complained in 1991 under the GATT dispute settlement procedure.

The embargo also applies to "intermediary" countries handling the tuna en route from Mexico to the United States. Often the tuna is processed and canned in an one of these countries. In this dispute, the "intermediary" countries facing the embargo were Costa Rica, Italy, Japan and Spain, and earlier France, the Netherlands Antilles, and the United Kingdom. Others, including Canada, Colombia, the Republic of Korea, and members of the Association of Southeast Asian Nations (ASEAN), were also named as "intermediaries".

The panel:

Mexico asked for a panel in February 1991. A number of "intermediary" countries also expressed an interest. The panel reported to GATT members in September 1991.

It concluded:

• that the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. (But the US could apply its regulations on the quality or content of the tuna imported.) This has become known as a "product" versus "process" issue.

• that GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country — even to protect animal health or exhaustible natural resources. The term used here is "extra-territoriality".

[247] www.wto.org > trade topics > environment

The Ruling:

What was the reasoning behind this ruling? If the US arguments were accepted, then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally — and to do so not just to enforce its own laws domestically, but to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system — to achieve predictability through trade rules.[248]

The panel's task was restricted to examining how GATT rules applied to the issue. It was not asked whether the policy was environmentally correct or not. It suggested that the US policy could be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules especially for this issue. That way, the members could negotiate the specific issues, and could set limits that would prevent protectionist abuse.[249]

The panel was also asked to judge the US policy of requiring tuna products to be labeled "dolphin-safe" (leaving to consumers the choice of whether or not to buy the product). It concluded that this did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.[250]

[248] www.wto.org > trade topics > environment
[249] Ibid
[250] Ibid

(vi) Other provisions:

(a) Transparency: information without too much paperwork[251]

Like non-discrimination, this is an important WTO principle. Here, WTO members should provide as much information as possible about the environmental policies they have adopted or actions they may take, when these can have a significant impact on trade. They should do this by notifying the WTO, but the task should not be more of a burden than is normally required for other policies affecting trade.

The Trade and Environment Committee say, WTO rules do not need changing for this purpose. The WTO Secretariat is to compile from its Central Registry of Notifications all information on trade-related environmental measures that members have submitted. These are to be put in a single database which all WTO members can access.[252]

(b) Domestically prohibited goods: dangerous chemicals, etc

This is a concern of a number of developing countries, which are worried that certain hazardous or toxic products are being exported to their markets without them being fully informed about the environmental or public health dangers the products may pose. Developing countries want to be fully informed so as to be in a position to decide whether or not to import them.

A number of international agreements now exist (e.g. the Basel Convention on the Control of Tran's boundary Movements of Hazardous Wastes and their Disposal, and the London Guidelines for Exchange of Information on Chemicals in International Trade). The WTO's Trade and Environment Committee do not intend to duplicate their work but it also notes that the WTO could play a complementary role.[253]

[251] www.wto.org > trade topics > investmentwww.wto.org > trade topics > competition policies

[252] www.wto.org > trade topics > competition policies

[253] www.wto.org

(c) **Liberalization and sustainable development: good for each other**

Does freer trade help or hinder environmental protection? The Trade and Environment Committee is analyzing the relationship between trade liberalization (including the Uruguay Round commitments) and the protection of the environment. Members say the removal of trade restrictions and distortions can yield benefits both for the multilateral trading system and the environment. Further work is scheduled.[254]

(d) Intellectual property, services: some scope for study

Discussions in the Trade and Environment Committee on these two issues have broken new ground since there was very little understanding of how the rules of the trading system might affect or be affected by environmental policies in these areas.

On services, the committee says further work is needed to examine the relationship between the General Agreement on Trade in Services (GATS) and environmental protection policies in the sector.

The committee says that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) helps countries obtain environmentally-sound technology and products. More work is scheduled on this, including on the relationship between the TRIPS Agreement and the Convention of Biological Diversity.[255]

[254] www.wto.org
[255] TRIPS Agreement clauses.

(vii) Questions:

If one country believes another country's trade damages the environment, what can it do? Can it restrict the other country's trade? If it can, under what circumstances?

At the moment, there are no definitive legal interpretations, largely because the questions have not yet been tested in a legal dispute either inside or outside the WTO. But the combined result of the WTO's trade agreements and environmental agreements outside the WTO suggest:

1. First, cooperate:
The countries concerned should try to cooperate to prevent environmental damage.

2. The complaining country can act(e.g. on imports) to protect its own domestic environment, but it cannot discriminate. Under the WTO agreements, standards, taxes or other measures applied to imports from the other country must also apply equally to the complaining country's own products ("national treatment") and imports from all other countries("most-favoured-nation").

3. If the other country has also signed an environment agreement, then what ever action the complaining country takes is probably not the WTO's concern.

4. What if the other country has not signed?
Here the situation is unclear and the subject of debate. Some environmental agreements say countries that have signed the agreement should apply the agreement even to goods and services from countries that have not. Whether this would break the WTO agreements remains untested because so far no dispute of this kind has been brought to the WTO. One proposed way to clarify the situation would be to rewrite the rules to make clear that countries can, in some circumstances, cite an environmental agreement when they take action affecting the trade of a country that has not signed. Critics say this would allow some countries to force their environmental standards on others.

5. When the issue is not covered by an environmental agreement, WTO rules Apply?
The WTO agreements are interpreted to say two important things. First, trade restrictions cannot be imposed on a product purely because of the way it has been produced. Second, one country can-not reach out beyond its own territory to impose its standards on another country.

3. Investment, Competition, procurement and simple process[256]

Ministers from WTO member-countries decided at the 1996 Singapore Ministerial Conference to set up three new working groups: on trade and investment, on competition policy, and on transparency in government procurement. They also instructed the WTO Goods Council to look at possible ways of simplifying trade procedures, an issue sometimes known as "trade facilitation". Because the Singapore conference kicked off work in these four subjects, they are sometimes called the "Singapore issues".

These four subjects were originally included on the Doha Development Agenda. The carefully negotiated mandate was for negotiations to start after the 2003 Cancún Ministerial Conference, "on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations". There was no consensus, and the members agreed on 1 August 2004 to proceed with negotiations in only one subject, trade facilitation. The other three were dropped from the Doha agenda

Investment and competition: what role for the WTO?

Work in the WTO on investment and competition policy issues originally took the form of specific responses to specific trade policy issues, rather than a look at the broad picture. Decisions reached at the 1996 Ministerial Conference in Singapore changed the perspective. The ministers decided to set up two working groups to look more generally at how trade relates to investment and competition policies. The working groups' tasks were analytical and exploratory. They would not negotiate new rules or commitments without a clear consensus decision.

The ministers also recognized the work underway in the UN Conference on Trade and Development (UNCTAD) and other international organizations. The working groups were to cooperate with these organizations so as to make best use of available resources and to ensure that development issues are fully taken into account. An indication of how closely trade is linked with investment is the fact that about one third of the $6.1 trillion total for world trade in goods and services in 1995 was trade within companies — for example between subsidiaries in different countries or between a subsidiary and its headquarters.

[256] www.wto.org > trade topics > investment

The close relationships between trade and investment and competition policy have long been recognized. One of the intentions, when GATT was drafted in the late 1940s, was for rules on investment and competition policy to exist alongside those for trade in goods. (The other two agreements were not completed because the attempt to create an International Trade Organization failed.)
Over the years, GATT and the WTO have increasingly dealt with specific aspects of the relationships. For example, one type of trade covered by the General Agreement on Trade in Services (GATS) is the supply of services by a foreign company setting up operations in a host country — i.e. through foreign investment. The Trade Related Investment Measures Agreement says investors' right to use imported goods should not depend on their export performance.

The same goes for competition policy. GATT and GATS contain rules on monopolies and exclusive service suppliers. The principles have been elaborated considerably in the rules and commitments on telecommunications. The agreements on intellectual property and services both recognize governments' rights to act against anti-competitive practices, and their rights to work together to limit these practices.

4. Electronic Commerce[257]

A new area of trade involves goods crossing borders electronically. Broadly speaking, this is the production, advertising, sale and distribution of products via telecommunications networks. The most obvious examples of products distributed electronically are books, music and videos transmitted down telephone lines or through the Internet. The declaration on global electronic commerce adopted by the Second (Geneva) Ministerial Conference on 20 May 1998 urged the WTO General Council to establish a comprehensive work programme to examine all trade-related issues arising from global electronic commerce. The General Council adopted the plan for this work programme on 25 September 1998, initiating discussions on issues of electronic commerce and trade by the Goods, Services and TRIPS (intellectual property) Councils and the Trade and Development Committee. In the meantime, WTO members also agreed to continue their current practice of not imposing customs duties on electronic transmissions[258]

[257] Ibdi
[258] www.wto.org > trade topics > electronic commerce

5. Labour Standards[259]

Labour standards are those that are applied to the way workers are treated. The term covers a wide range of things: from use of child labour and forced labour, to the right to organize trade unions and to strike, minimum wages, health and safety conditions, and working hours.

Consensus on core standards, work deferred to the ILO:
There is a clear consensus: all WTO member governments are committed to a narrower set of internationally recognized "core" standards — freedom of association, no forced labour, no child labour, and no discrimination at work (including gender discrimination).

At the 1996 Singapore Ministerial Conference, members defined the WTO's role on this issue, identifying the International Labour Organization (ILO) as the competent body to negotiate labour standards. There is no work on this subject in the WTO's Councils and Committees. However the secretariats of the two organizations work together on technical issues under the banner of "coherence" in global economic policy-making. However, beyond that it is not easy for them to agree, and the question of international enforcement is a minefield.[260]

[259] Ibdi.
[260] Ibdi.

Chapter 7.

Developing country Members & WTO Dispute Settlement

(i) Special rules for developing country Members
(ii) Legal assistance for developing country Members

Developing-country Members and WTO dispute settlement

As noted above, developing-country Members have made much use of the WTO dispute settlement system. In many years since 2000, developing-country Members, as a group, have brought more disputes to the WTO than developed country Members.[261]

To date, Brazil (twenty-six complaints), Mexico (twenty-three complaints), India (twenty-one complaints), Argentina (eighteen complaints), Thailand (thirteen complaints), China (eleven complaints) and Chile (ten complaints) are among the biggest users of the system. The 2004 Sutherland Report observed, with regard to the record of complaints under the WTO dispute settlement system, that:
one of the interesting facets of this record of complaints is a much greater participation of developing countries than was the case in the GATT dispute settlement system. Of course, the major trading powers continue to act either as complainant or respondent in a very large number of cases. Given their large amount of trade with an even greater number of markets, it could hardly be otherwise.

Yet, developing countries – even some of the poorest (when given the legal assistance now available to them) – are increasingly taking on the most powerful. That is how it should be.[262]

Developing-country Members have used the WTO dispute settlement system to bring cases against the economics upper powers and have done so successfully.

US – Underwear, a complaint by Costa Rica, and even more so *US –Gambling (2005)*, a complaint by Antigua and Barbuda, are well-known examples of successful 'David versus Goliath' use of the system.

Developing-country Members have also used the system against other developing-country Members.

Examples of such use of the system are *Turkey – Textiles (1999)* , a complaint by India; *Chile – Price Band System(2002)*, a complaint by Argentina; *Thailand –*

[261]Developing-country Members brought more disputes to the WTO than developed-country Members
[262]Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (the 'Sutherland Report') (WTO, 2004), para. 222.

Cigarettes (Philippines) (2011) , a complaint by the Philippines; and *Dominican Republic – Safeguard Measures (2012)* , complaints by Costa Rica, El Salvador, Guatemala and Honduras.
To date, least-developed-country Members have used the WTO dispute settlement system only once. In February 2004, Bangladesh requested consultations with India on the imposition of anti-dumping duties by India on batteries from Bangladesh.[263]

To date, the WTO dispute settlement system has never been used *against* least-developed-country Members. Note in this respect that Article 24.1 of the DSU requires Members to 'exercise due restraint' in using the WTO dispute settlement system in disputes involving a least-developed-country Member. The DSU contains in addition a number of other provisions providing for special treatment or consideration for developing-country Members involved in WTO dispute settlement. This section examines these provisions. It also discusses the legal assistance available to developing-country Members involved in WTO dispute settlement.

7.1 Special Rules for Developing-Country Members

The DSU recognises the difficulties developing-country Members may encounter when they are involved in WTO dispute settlement. Therefore, the DSU contains some special rules for developing-country Members. Such special DSU rules are found in Article 3.12 (regarding the application of the 1966 Decision),[264]Article 4.10 (regarding consultations), Article 8.10 (regarding the composition of panels), Article 12.10 (regarding consultations and the time top reaper and present

[263]Request for Consultations by Bangladesh, *India – Anti-Dumping Measure on Batteries from Bangladesh* , WT/DS306/1, dated 2 February 2004. On 20 February 2006, the parties informed the DSB that a mutually satisfactory solution to the matter had been achieved. The anti-dumping measure addressed in the request for consultations had been terminated by India. See Notification of Mutually Satisfactory Solution, *India – Anti-Dumping Measure on Batteries from Bangladesh*, WT/DS306/3, dated 23 February 2006.

[264]Decision of 5 April 1966 on Procedures under Article XXIII of the GATT, BISD 14S/18. Article 3.12 of the DSU allows a developing-country Member that brings a complaint against a developed-country Member to invoke the provisions of the Decision of 5 April 1966 of the GATT CONT RACT ING PART IES. These provisions may be invoked as an 'alternative' to the provisions contained in Articles 4, 5, 6 and 12 of the DSU. To date, the provisions of the 1966Decision have been 'invoked' only once, on 21 March 2007, in a complaint brought by Colombia against the European Communities' new 'tariff-only' regime for bananas applied from 1 January 2006. See Request for Consultations by Colombia, *European Communities – Regime for the Importation of Bananas*, WT/DS361/1. The reason for the lack of enthusiasm for the provisions of the 1966 Decision is undoubtedly that the DSU provisions afford developing-country complaining parties treatment at least as favourable as, if not more favourable than, the treatment afforded by the 1966Decision.

arguments), Article 12.11 (regarding the content of panel reports), Article 21.2 (regarding implementation of adopted recommendations and rulings), Article 21.7 (regarding the DSB surveillance of the implementation of adopted recommendations or rulings), Article 24 (regarding least-developed countries) and Article 27(on the assistance of the WTO Secretariat). Most of these special rules for developing countries are discussed above.[265]

The special rules, for the most part, have these special rules have been of limited significance to date.

7.2 Legal Assistance for Developing-Country Members

Many developing-country Members do not have the specialised 'in-house' legal expertise to participate in the most effective manner in WTO dispute settlement. However, as discussed above, WTO Members can be assisted and represented by private legal counsel in WTO dispute settlement proceedings.[266]

The Appellate Body noted in *EC –Bananas III (1997)*:
that representation by counsel of a government's own choice may well be a matter of particular significance –especially for developing-country Members – to enable them to participate fully in dispute settlement proceedings.[267]

However, assistance and representation by private legal counsel has its costs, and these costs may be quite burdensome for developing-country Members. Other forms of assistance are needed to:

(1) lower further the threshold for developing-country Members, and, in particular, low-income-country and least-developed-country Members, to bring complaints against other Members; or

(2) support developing-country Members against whom complaints are brought by other Members. The WTO Secretariat assists all Members in respect of dispute settlement when they so request. However, the DSU recognises that there

[265] ibid
[266] ibid
[267] Appellate Body Report, *EC – Bananas III (1997)*, para. 12.

may be a need to provide additional legal advice and assistance to developing-country Members.[268]

To meet this additional need, Article 27.2 of the DSU requires that the WTO Secretariat make qualified legal experts available to help any developing-country Member that so requests.[269]

The extent to which the Secretariat can assist developing-country Members is, however, limited by the requirement that the Secretariat's experts give assistance in a manner 'ensuring the continued impartiality of the Secretariat'.[270]

Effective legal assistance for developing-country Members in dispute settlement proceedings is given by the Geneva based Advisory Centre on WTO Law (ACWL).

The ACWL is an intergovernmental organisation, fully independent of the WTO, which functions essentially as a law firm specialising in WTO law, providing legal services and training exclusively to developing-country and economy-in-transition members of the ACWL and *all* least-developed countries. The ACWL provides support at all stages of WTO dispute settlement proceedings at discounted rates. The ACWL currently has forty-one members: eleven developed countries and thirty developing countries and economies-in transition.[271]

The services of the ACWL are at present available to a total of seventy-three countries. On the occasion of the official opening of the ACWL on 5 October 2001, Mike Moore, then WTO Director-General, said:

"The International Court of Justice has a small fund out of which costs of legal assistance can be paid for countries who need such help. But today marks the first time a true legal aid centre has been established within the international legal system, with a view to combating the unequal possibilities of access to international justice as between States.[272]

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[268]Article 27.2 of the DSU.342

[269]For this purpose, the Institute for Training and Technical Cooperation, a division of the WTO Secretariat, presently employs two independent consultants on a permanent part-time basis. See *WTO Analytical Index (2012)*, Volume II,1884

[270]Article 27.2, final sentence, of the DSU

[271]www.acwl.ch/e/members/Introduction.html.

[272]Inauguration of the ACWL: Speech delivered by Director-General of the WTO, 5 October 2001, at

Since its establishment, the ACWL has become a major player in WTO dispute settlement. During the period from2001 to 2012, the ACWL provided support in almost forty WTO dispute settlement proceedings. [273]
In addition, the ACWL provides free of charge legal advice on substantive and procedural aspects of WTO law.[274]

Finally, the ACWL also offers training courses and seminars on WTO law and policy and provides for the Secondment Programme for Trade Lawyers, under which government lawyers from least-developed countries and developing-country ACWL members join the staff of the ACWL for a period of nine months.[275]

www.acwl.ch/e/news/milestone_0004.html
[273] www.acwl.ch/e/disputes/WTO_disputes.html
[274] www.acwl.ch/e/legal_advice/legal_advice.html.
[275] www.acwl.ch/e/training/training.html.

Chapter 8.

Future challenges to WTO Dispute Settlement

8. Future challenges to WTO dispute settlement

In 1996, the then WTO Director-General Renato Ruggiero referred to the WTO dispute settlement system as 'the jewel in the crown of the WTO'. While obviously not perfect, the WTO dispute settlement system has by and large lived upto, if not surpassed, Ruggiero's high expectations. The frequent use by a significant number of developed- as well as developing-country Members to resolve often politically sensitive issues, and the high degree of compliance with there commendations and rulings, testify to the success of the WTO dispute settlement system.

The 2004 Sutherland Report on *The Future of the WTO* stated:
The current WTO dispute settlement procedures – constructed with painstaking, innovative, hard work during the Uruguay Round – are to be admired, and are a very significant and positive step forward in the general system of rules-based international trade diplomacy. In many ways, the system has already achieved a great deal, and is providing some of the necessary attributes of 'security and predictability', which traders and other market participants need, and which is called for in the Dispute Settlement Understanding (DSU), Article 3.[276]

The WTO dispute settlement system makes an important contribution to the objective that within the WTO 'right prevails over might'. As the legendary Julio Lacarte Muró, the first Chair of the Appellate Body, remarked, the system works to the advantage of all Members, but it especially gives security to developing-country Members that have often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests.[277]

While there exist much satisfaction with the performance of the WTO dispute settlement system, there have been negotiations on its further improvement ever since 1998.[278]

[276] Report by the Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millennium (the 'Sutherland Report') (WTO, 2004), para. 213
[277] J. Lacarte and P. Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System', *Journal of International Economic Law*, 2000, 400. Ambassador Lacarte Muró served as the Deputy Executive Secretary of the GATT in 1947–8, and as Permanent Representative of Uruguay to the GATT in the 1960s, 1980s and early 1990s. Hewas the Chair of the Uruguay Round committee that negotiated the DSU.
[278] As agreed at the time of the adoption of the *WTO Agreement*, the WTO Members first reviewed the DSU in 1998and 1999.

Currently, DSU reform negotiations take place in thecontext of the Doha Round negotiations.[279]

The proposals for improvement tabled and discussed since the start of these negotiations are many and wide-ranging.[280]A few of these proposals suggest quite radical reforms to the system, such as the EU proposals for the replacement of the *ad hoc* panels with a permanent panel body or a roster of permanent panellists (these proposals are currently no longer actively considered); and the US proposals for more Member-control over WTO dispute settlement, and in particular over panel and Appellate Body reports (these proposals to curtail the WTO dispute settlement system are still being considered).

Most proposals for improvement are, however, more technical in nature, although they may touch on politically sensitive issues. Examples of such proposals are the proposals on:

(1) timeframes and time-saving by, for example, halving the time for mandatory consultations, and establishing panels by reverse consensus at the *first* DSB meeting;
(2) improved conditions for Members seeking to join consultations;
(3) the notification of mutually agreed solutions;
(4) the facilitation of panel composition;
(5) the extension of third party rights;
(6) the protection of business confidential information;
(7) the issue of *amicus curiae* briefs;
(8)enhanced transparency through opening panel meetings and Appellate Body hearings to the public;
(9) the suspension of panel proceedings;
(10) the introduction of remand in Appellate Body proceedings;
(11) the 'sequencing' issue;
(12) the "post-retaliation" issue;
(13) the promotion of prompt and effective compliance by strengthening the remedies available for breach of WTO law, including collective retaliation and monetary compensation; and
(14) the strengthening of special and differential treatment for developing-country Members.

[279]Ministerial Conference, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, dated 20 November 2001, para.30.
[280]All publicly available documents relating to the DSU reform negotiations can be found on the WTO website as TN/DS documents

In July 2008, the Chair of the DSB Special Session issued under his own responsibility a consolidated draft legal text, which has been the basis for the DSU reform negotiations since.[281]

In April 2011, the Chair last reported on the state of play of the negotiations as follows:

Participants have engaged in our recent work in a constructive spirit, and we have made measurable progress in a number of areas. Specifically, we are close to an understanding on draft legal text on sequencing, we have identified key points of convergence on post-retaliation, and we have conducted constructive work on third-party rights, time savings and various aspects of effective compliance. We have also discussed certain aspects of flexibility and Member-control, and in that context, made substantial progress towards draft legal text on the suspension of panel proceedings. Nonetheless, much work remains to be done in order to reach agreement.

In addition to completing the work on the issues referred to above, we will need to discuss also panel composition, remand, mutually agreed solutions, strictly confidential information, transparency and *amicus curiae* briefs and developing country interests, including special and differential treatment.[282]

As the Chair noted, a successful conclusion to the negotiations will 'require additional flexibility in Members' positions'.[283]

To date, Members have not been able to reach agreement on the reform of the DSU. However, the problem of the WTO dispute settlement system in the years to come may not be its shortcomings and Members' inability to address these shortcomings. Its problem will rather be its success, discussed throughout this chapter. This success has created an unwelcome institutional imbalance in the WTO between its 'judicial' branch and its political, 'rule-making' branch.

[281]This text was initially circulated as an informal document (JOB(08)/81) on 18 July 2008 but it is reproduced as Appendix A to the 2011 Report of the Chair of the DSB Special Session to the Trade Negotiations Committee, TN/DS/25, dated 21 April 2011

[282]Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Ronald Saberio Soto, to the Trade Negotiations Committee*, TN/DS/25, 21 April 2011, paras. 3 and 4.343

[283] ibid

The WTO has not been very successful in negotiating new and/or improved rules for the multilateral trading system.[284]

Confronted with the ineffectiveness of the political branchof the WTO, WTO Members may be ever more tempted to use the dispute settlement system to bring about new or improved rules to address the manifold problems confronting the multilateral trading system.

Already in 2001, Claude Barfield of the Washington-based American Enterprise Institute suggested that the WTO dispute settlement system is 'substantively and politically unsustainable'. Barfield suggested that governments may only continue to obey its rulings if its powers are curbed.[285]

While strongly disagreeing with Barfield's prescription, others have also warned against excessive reliance by WTO Members on adjudication, instead of seeking political agreement on new rules, to resolve problems arising in trade relations.[286]

[284] ibid

[285] C. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (American Enterprise Institute Press, 2001), 1–68.

[286] C.-D. Ehlermann, *Some Personal Experiences as Member of the Appellate Body of the WTO*, Policy Papers, RSC No. 02/9 (European University Institute, 2002), 14.344

Chapter 9.

Conclusion

Conclusion:

The Dispute Settlement system in WTO is a major change from the previous GATT system. For the first time, an independent judicial system to enforce the WTO law is in place. Even the powers of the General Council and the Ministerial Conference have been curbed in the WTO agreement on violation of WTO law.

The Dispute Settlement panels have powers equivalent to those of judicial benches. The power to enforce an international law is major breakthrough in international affairs.

WTO is perhaps the only International Institution which has successfully settle the disputes among the nations amounting high value and spreading in all over major areas of the services provided by the WTO organization.

Various countries which enter into regional agreement often conflict with the WTO regulations but the Dispute Settlement Body helps in finding a proper solution for the said area of disputes which arises or which may arise.

Trade related conflicts are smoothly resolved with the help of WTO Dispute Settlement Body which keeps in mind the nature of issues and deeply thinks over the appropriate solution which is required for the free flow of trade and hence satisfy the aim of WTO.

Apart from various activities and functions carried by WTO there are still old and new challenges which they have to face. Such as, the poverty and mal-nutrition affected countries and also the new challenges which includes the Global Warming or Environmental stability and the Bio-diversity issues along with emerging new economic markets and regulating the competitive issues involved in it.

Chapter No. 10

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G

Guatemala –Cement I (1998)

I

India – Patents (US) (1998)

J

Japan – Alcoholic Beverages II (1996)

Japan – Film (1998)

M

Mexico – Corn Syrup (2001)

S

Shrimp-turtle and dolphin 1998

U

US – Gasoline (1996)

US – Wool Shirts and Blouses (1997)

US – Shrimp (1998)

US – Certain EC Products (2001)

US – Line Pipe (2002)

US – Corrosion-Resistant Steel Sunset Review (2004)

US – Upland Cotton (2005)

US – Gambling (2005)

US – Zeroing (EC) (2006)

US – Tuna II (Mexico) (2012)

US – Clove Cigarettes (2012)

Y

Yellow fin tuna case (1991)

Dynamic Links

Sr. No	***Name of the Link***
1.	http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3
2.	https://www.wto.org/English/tratop_e/dispu_e/dispu_e.htm
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