Chapter IV
ROLE AND PRINCIPLES OF THE WTO
DISPUTE SETTLEMENT

4.1 Introduction

The WTO agreements provide for many far-reaching rules concerning international trade in goods, trade in services and trade-related aspects of intellectual property rights. The WTO dispute settlement institutions function very much like a court of international trade. It has compulsory jurisdiction. It has its own rules of law. Its decisions are binding on the parties and sanction may be imposed against non-observance of its decision. The WTO has a remarkable system to settle the disputes between WTO Members concerning their rights and obligations under the WTO Agreement.

The WTO dispute settlement system has been operational since 1st January 1995. Between 1st January 1995 and 1 Dec. 2007 a total of 369 disputes had been brought in to the WTO for resolution\(^1\), while the WTO’s predecessor ‘GATT’ reported only 132 cases during 46 years between 1948 and 1994.\(^2\) The WTO dispute settlement system has been used by Developed Country Members and Developing Country Members alike.\(^3\)

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\(^2\) See WT/DS/OV/31, dated 22 August 2007.

\(^3\) For statistics on complainants and respondents in the WTO dispute settlement system, See www.trade law.net.
Some of the disputes brought before the WTO dispute settlement system have triggered considerable controversy and public debate, and have attracted much media attention. This has been the case, for example, for dispute on national legislation for the protection of public health or the environment, such as

**Cases**

- the EC-Hormones dispute on the European communities, import ban on meat for cattle treated with growth hormones.\(^5\)
- the US-shrimp dispute on the US import ban on shrimp harvested with nets that kill sea turtles.\(^6\)
- the EC-Asbestos dispute on a French ban on asbestos and asbestos containing products\(^7\) and
- the EC approval and Marketing of Biotech Products, dispute on measures affecting the approval and marketing of genetically modified products in the European Union.\(^8\)

The WTO dispute settlement system was not established all on a sudden. It is not an entirely novel system. On the contrary, this

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\(^5\) EC Hormones Complaints by the US and Canada, Ibid pp.848-52.

\(^6\) US-Shrimp Complaint by India, Malaysia, Pakistan and Thailand, Ibid See pp.181 and 182.

\(^7\) Ibid pp. 374-82 for asbestors complaint by Canada.

\(^8\) Ibid pp. 835-7-EC Approval and Marketing of Biotech Products, Complained by the US; Canada and Argentena.
system is based on, and has taken on board, almost fifty years of experience in the resolution of trade disputes in the context of the GATT 1947. Article 3:1 of the DSU states.

Members affirm their adherence to the principles of management of disputes heretofore applied under Article XXII and XXIII of GATT 1947 and the rules and procedures as further elaborated and modified therein”.

4.2 Principles of WTO Dispute Settlement

The WTO possesses a wide range system for the resolution of trade disputes between Members of the WTO. The system involves the following:

- The objects and purpose of the WTO dispute settlement system.
- The various methods adopted for the settlement of WTO disputes.
- The jurisdiction of the WTO dispute settlement system.
- Access to the WTO dispute settlement system.
- Chronological time schedule for the WTO dispute settlement process.
- Rules of interpretation and the burden of proof applicable in WTO dispute settlement.
- The confidentiality of and rules of conduct for WTO dispute settlement.
- Remedies available against breach of WTO Law
- and special rules and assistance to developing country members.
4.2.1 Objects and purpose of the WTO dispute settlement system

The principal object and purpose of the WTO dispute settlement system is the prompt settlement of disputes between WTO Members, with respect to their rights and obligations under the WTO law.

Article 3.3 of the DSU states that the prompt settlement of such disputes “is essential to the effective functioning of the WTO and the maintenance of proper balance between the rights and obligations of Members.”

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 recognise that it seems to preserve the rights and obligations of Members under the covered agreement and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of the Public International Law.”

According to the Panel of the US Section 301, Trade Act, the DSU is one of the most important instruments of the WTO in protecting the security and predictability of the Multilateral Trading System.9

4.2.2 Settlement of Dispute through Multilateral Procedures

The object and purpose of the dispute settlement system is for

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9 See Panel Report of US, Section 301 Trade Act Para 7.75.
Members to settle dispute with other Members through the multilateral procedures of the DSU rather through unilateral action.\(^{10}\)

Article 23.1 of the DSU states: When Members seek redressal of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediments 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."

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.\(^{11}\)

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 violation of WTO Law.\(^{12}\)

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\(^{10}\) See Article 23 of the DSU

\(^{11}\) Appellate Body Report, US-certain EC products para 111. The panel in the case noted. An important reason why Article 23 of the DSU must be interpreted with a view to prohibiting any form of unilateral action is because such unilateral actions threaten the stability and predictability of the multilateral trade system, a necessary component for market condition conducive to individual economic activity in national and global markets which, in themselves, constitute a fundamental goal of the WTO. Unilateral action are, therefore, contrary to the essence of the multilateral trade system of the WTO. Panel Report US-certain EC products para 6.14. See also Panel Report, US-section 301 Trade Act para 7-71.

\(^{12}\) The panel in US-section 301, Trade Act, noted. There is a great deal more states conduct which can violate the general obligation in Article 23.1, to
The Panel in EC-commercial Vessels held that;

“the obligation to have recourse to the DSU, when Members seek redressal of a violation covers any act of a Member in response to what it considers to be a violation of a WTO obligation by another Member whereby the first Member attempts unilaterally to restore the balance of rights and obligations.”

It is important to note that concerns regarding unilateral actions by the United States against what it considered to be violations of GATT law under section 301 of the US Trade Act of 1974 and even more so under the ‘super 301’ created by the Trade and Competitiveness Act of 1988 were a driving force behind the negotiations of the DSU. The other GATT Contracting Parties were greatly alarmed by the ‘Vigilante Justice’ of the United States in the field of international trade. They demanded that the United States change its legislation have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2 Panel Report. US-Section 301 Trade Act para 7.45. The panel gave two examples: not notifying mutually agreed solutions to the DSB as required in Article of the DSU and not abiding by the requirements for a request for consultation on for establishment of a panel as elaborated in Article 4 and 6 of the DSU and Article 17.14 of the DSU.

Panel Report. EC-Commercial vessels, para 7.207 The act at issue in this case was an EC regulation adopted in response to Korea’s alleged failure to abide by the terms of an agreement between Korea and the European communities on subsidies for shipbuilding. According to the panel, the European communities sought to achieve results unilaterally through adopting a regulation where it should have used the DSU, therefore the regulation was found to be inconsistent with Article 23.1 See Panel Report. Korea-Commercial Vessels para 7.220.
which allowed for much unilateral action. The United States, however, argued that the existing GATT dispute settlement system, as a result of the consensus requirement was too weak to protect US trade interest effectively. In this respect Robert Hudec noted:

“This United States counter attack against the procedural weakness of the GATT 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 lighter dispute settlement system that would meet US complaints.14

In this way, agreement was eventually reached on the current dispute settlement system. A key feature of which is the assistance on the resolution of disputes through multilateral procedures as reflected in Article 23 of the DSU.

4.2.3 Settlement of dispute through consultation, if possible

‘According to Article 3.7 of the DSU, the aim of dispute settlement mechanism is to secure a possible solution, a solution mutually acceptable to the parties to a dispute and consistent with the covered agreement is very much to be preferred.’

It means the DSU prefers solution mutually acceptable to the

parties through negotiation rather than adjudication so that, each dispute settlement proceedings must start with consultations between the parties to the dispute. To resolve dispute through consultation is not only cheaper but also more satisfactory for long-term trade relations with the other party to the dispute than adjudication by a panel.

### 4.2.4 Settlement of dispute and clarification of WTO Law

As per Article 3.2 of the DSU, the dispute settlement system serves not only to preserve the rights and obligations of Members under covered agreements, but also to clarify the existing provisions of those agreements. The covered agreements contain gaps and constructive ambiguity so that it requires clarification of existing provisions. However, the last sentence of Article 3.2 states, “The recommendations and rulings of the DSU cannot add to or diminish the rights and obligations provided in the covered agreement.”

When allowing the WTO dispute settlement system to clarify WTO law, Articles 3.2 and 19.2 explicitly preclude the system from adding or diminishing the rights and obligations of Members. It means the DSU is very much cautious about the WTO dispute settlement system against ‘Judicial Activism’. 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.

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15 The Appellate Body Report US-Certain EC products, para 116-21. The Appellate Body in this case uphold the panels finding of violation of Article 3.7 of the DSU.
In Chile-Alcoholic Beverages, Chili argued before the Appellate Body that the panel had acted inconsistently with Article 3.2 and 19.2 of the DSU as it had added to the rights and obligations of Members. The Appellate Body found that “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 conclusion reflected a correct interpretation and application of provisions of the Covered Agreements.16

4.2.5 Settlement of Dispute in Good faith

Article 3.10 of the DSU states the use of dispute settlement procedures, and that all Members must engage in these procedures in good faith in an effort to resolve the dispute. In other words, parties involved in the dispute settlement process should engage with genuine intention to see the dispute resolved, it is part of the object and purpose of WTO dispute settlement system.

In US-FSC, the Appellate Body found that the United States had failed to act in good-faith, by failing to bring procedural deficiencies, ‘reasonably and promptly’ to the attention of the complainant and the panel, so that correction, if needed, could have been made.17

In Argentina Poultry Anti Dumping Duties. Argentina argued that Brazil failed to act in good faith by first challenging Argentina’s anti-dumping measures before a MERCOSUR Ad


Hoc Tribunal and then having lost that case, challenging the same measure in WTO dispute settlement proceedings. The panel, referring the findings of the Appellate Body, in **US-off set Act (Byrd Amendment) held:**

“We consider that two conditions be found to have failed to act in good faith. First the Member must have violated a substantive provision of the WTO agreement. Second, there must be something more than mere violation.\(^{18}\)

**In E.C – Export subsidies in sugar, the Appellate Body** held that in the context of determining whether a Member had engaged in dispute settlement proceedings in good faith ‘estopal may be examined.\(^{19}\)

### 4.2.6 Methods of WTO dispute Settlement

According to the provision of DSU, there are four methods to settle disputes between WTO Members; such as

1. Consultation or negotiation.
2. Adjudications by Panel and Appellate Body
3. Arbitration and
4. Good offices, conciliation and mediation

The DSU provides first preference to resolve disputes through consultations. Therefore, consultation or at least an attempt for consultation should be made before going for adjudication.

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\(^{19}\) See Appellate Body Report, EC-Export subsidies on Sugar, para 307.
If consultation fails to resolve the dispute, the complainant may resort to adjudication by a panel and, if either party to the dispute prefers an appeal to the findings of the panel, then adjudication by the Appellate Body becomes the last resort.

The Articles 4 and 6 to 20 of the DSU provide the dispute settlement methods. However, the WTO dispute settlement system provides for expeditious ‘arbitration’ as an alternative means of dispute settlement. However, disputes arising under a covered agreement may prefer to resort to arbitration rather than follow the procedures in Articles 4 and 6 to 20 of the DSU. In that case parties must define the issues referred to arbitration and agree on particular procedure to be followed. The parties must also agree to abide by the arbitration award. Pursuant to Article 3.5 of the DSU the arbitration award must be consistent with the WTO agreement.

4.2.7 Use of Good Offices, Conciliation or mediation

Article 5 of the DSU provides the use of good offices, conciliation or mediation to settle dispute. Good offices, conciliation or mediation may be requested by any party at any time. Also, they may begin and be terminated at any time. If the parties agree procedures for good office, conciliation or mediation may continue while the panel process proceeds.

20 See Article 25 of the DSU.
21 See Articles 25.1 and 25.2 of the DSU.
22 See Article 5.3 of the DSU.
23 See Article 5.5 of the DSU.
In EC-Bananas III (Article 21.5-Equador) Equador tried to resolve the matter by means of a negotiated solution with the European Communities using the good offices of Norway’s foreign Minister, Jonas Gahr Store.

The Director General may, acting in an ex-officio capacity, offer under Article 5 of the DSU good offices, conciliation or mediation with a view to assisting Members to settle dispute. In July 2001, the Director General reminded Members of his availability to help settle dispute, through good offices, mediation or conciliation. On 4 Sept. 2002, the Philippines, Thailand and the European communities jointly requested mediation by the Director General or by a mediator designated by him with their agreement, in a matter concerning the tariff treatment of canned tuna. The requesting Members had held three rounds of consultations but could not reach a mutually acceptable solution.

4.3 Jurisdiction of the WTO Dispute settlement system

The WTO dispute settlement system vigorously exists by virtue of its broad scope of jurisdiction as well as by the compulsory, exclusive and contentious nature of that jurisdiction. Here I would like to examine the scope and nature of the jurisdiction of the WTO dispute settlement system.

24 See Article 5.6 of the DSU.
25 Communicate in from the Director General, Article 5 of the DSU.
4.3.1 One integrated system for all WTO Disputes

The WTO dispute settlement system has jurisdiction over any dispute between WTO Members arising under the covered agreements.26 Article 1.1 of the DSU states (only 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 the Appendix I to the understanding (covered agreements). Covered Agreements listed in Appendix I include the WTO agreement, the GATT 1994, and all other multilateral agreements on trade in goods, the GATTs, the TRIPS agreement and the DSU.”27

The DSU provides for a single coherent system of rules and procedures for the dispute settlement, applicable to disputes arising under any of the covered agreements.28 However, some of the covered agreements provide for a few special and additional rules and procedures, designed to deal with the particularities of dispute settlement relating to obligations arising under specific covered agreements.29

According to Article 1.2 of the DSU these special or additional rules and procedures to the extent that there is a difference

26 For the concept of covered agreement see below in the same page.
27 The only Multilateral trade agreement which is not a covered agreement is the Trade Policy Review Mechanism.
28 The Appellate Body Stated in Guatimala-cement I, that Article 1.1 of the DSU establishes an integrated dispute settlement systems which appears to all covered agreements, see Appellate Body Report, Guatimala-Cement I, para 64.
29 Ibid, para 66.
between them. The Appellate Body in Guatimala-Cement I ruled, if there is no ‘difference’, the rules and procedures of the DSU apply together with the special on additional provisions of the covered agreement. In our view, it is only where the provision of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementary to each other that the special or additional provision should only be found to prevent over a provision of the DSU in a situation where adherence to the one provision will lead to the violation of the other provision, i.e., in the case of a conflict between them.\(^{30}\)

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.\(^{31}\)

### 4.3.2 Compulsory Jurisdiction

As per Article 23.1 of the DSU the jurisdiction of the WTO dispute settlement system is compulsory in nature. It states that where Members seek the redressal of a violation of obligation or other nullification or impairment of benefits under the covered agreement or on impediment to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this understanding.

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\(^{30}\) Ibid, para 65, the Appellate Body reaffirmed its narrow definition of the conflict, in US Hotrolled steel para 55 and 62.

\(^{31}\) Appellate Body Report, Guatimala-Cement I, para 66.
According to this provision a complaining Member is obliged to bring any dispute arising under the covered agreement to the WTO dispute settlement system. In other words a responding Member has as a matter of law, no choice but to accept the jurisdiction of the WTO dispute settlement system.

With regard to the latter, Article 6.1 of the DSU states,

“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.”

As against the 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 that dispute. Membership of the WTO constitutes consent to, and acceptance of the WTO dispute settlement system.

4.3.3 Exclusive jurisdiction

The Panel in US-section 301 Trade Act ruled that Article 23.1 of the DSU imposes on all Members to have recourse to the multilateral process set out in the DSU when they seek redressal 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. Thus, what one could call exclusive dispute resolution clause is
an important new element of the Members’ right and obligations under the DSU.32

Members shall thus have recourse to the WTO dispute settlement system to the exclusion of any other system. Article 23.1 of the DSU both ensures, the exclusively of the WTO. Vis-à-vis other international forum and protects the multilateral system from unilateral conduct.

4.3.4 Contentious Jurisdiction

The WTO dispute settlement system has only contentious, and not advisory jurisdiction.

In US-Wool Shirts and Blouses, 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 provision of the WTO Agreement outside the context of resolving a particular dispute.33

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

In EC-commercial vessels, 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.34

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32 Panel Report, US-Section 301 Trade Act, para 7.43.
34 See Panel Report, EC-Commercial vessel, para 7.30.
4.3.5 Access to the WTO Dispute Settlement System

Access to or to the use of WTO dispute settlement system is limited to the Members of the WTO.

In US-shrimp, the Appellate Body ruled:

“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 individual or international organisations, whether governmental or non-governmental. Only Members may become parties to a dispute for whom a panel may be raised and only Members having substantial interest in a matter before a panel may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to the dispute, or who have notified their interest in it becoming third parties in such a dispute to the DSB, have legal right to make submissions considered by a panel.”35

The WTO dispute settlement system is a Government-to-Government dispute settlement system for disputes concerning rights and obligations of WTO Members only. The WTO Members are entitled to indicate proceedings against breaches of WTO law. The WTO secretariat cannot prosecute breaches of NGOs or industry associations entitled to do so.36

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36 On indirect access to WTO dispute settlement.
4.3.6 Causes of Action

Each covered agreement contains one or more consultations and dispute settlement provisions. These provisions are set out when a Member can have recourse to the WTO dispute settlement system. For the GATT 1994, the relevant provisions are Articles XXII and XXIII. Article XXIII.1 of GATT 1994 of particular importance, 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

(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.”

In India Quantitative Restrictions case, the Appellate Body held,

“The 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 obligation may resort to the dispute settlement procedures of Article XXII. The United States considers that a benefits accruing to it under the GATT 1994 was nullified or impaired as a result of 'India’ alleged failure to carry out its obligations regarding balance of payment restriction under Article XVIII.B of the GATT 1994. Therefore the United States was entitled to have recourse to the dispute settlement procedures of Article XXIII with regard to this dispute.37"

The consultations and dispute settlement provisions of most other covered agreements incorporate, by reference, Article XXII and XXIII of the GATT 1994. For example Article 11.1 of the SPS Agreement entitled consultation and dispute settlement.

Unlike other international dispute settlement systems, the WTO system thus provides for three types of complaints.

Violation complaints

1. Non-violation complaints and
2. Situation complaints.38

In the case of non-violation complaints or situation complaints, the complainant must demonstrate that there is nullification or impairment of a benefit or that the achievement of an objective is impeded.39

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37 Appellate Body Report, India-Quantitative Restrictions para 84.

38 Pursuant to Articles XXIII.3 of the GATT, situation complaints are not possible in dispute arising under the GATT, Non-violation complaints and situation complaints are currently not possible in dispute arising under the TRIPS Agreements.

39 See Article 26.1 (for non-violation complaint) and 26.2 (for violation complaints) of the DSU. Article 26.1 and 26.2 set at a few special rules for
In the case of a violation complaint, there is a presumption of nullification or impairment when the complainant demonstrates the existence of the violation.

Article 3.8 of the DSU states,

“In cases where there is an infringement of the obligation 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 Member’s 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 changes.”

In no case has the respondent been successful in rebutting the presumption of nullification or impairment. For example.

In **EC-Export subsidies on sugar**, the Appellate Body upheld the Panel’s finding that the European Communities did not rebut the presumption of nullification or impairment. The Appellate Body noted that the EC also on appeal did not try to rebut this presumption.

Violation complaints are the most common type of complaint. To date there has been few non-violation complaints.

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these types of complaints. The Panel in EC-Asbestos rejected the argument by the European committees that the rules on non violation nullification apply only if the measure in question does not fall under other provisions of GATT 1994.
**In EC-Asbestos,** the Appellate Body stated that the (non-violation nullification or impairment) remedy... should be approached with countries, and should remain an exceptional remedy.40

None of the non-violation complaints brought to the WTO has been successful until date whereas, there have never been any situation complaints. The difference between the WTO system and other international dispute settlement system with regard to cause of action is of little practical significance.41

There is no explicit provision in the DSU requiring a Member to have a legal interest in order to have recourse to the WTO dispute settlement system. It has been held that such a requirement is not implied either in the DSU or in any other provision of the WTO Agreement.42

**In EC-Bananas III, 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 the Article 3.7 of the DSU suggest, further more, that a Member is expected to be largely self-regulating in deciding whether any

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40 Appellate Body Report, EC-Asbestos, para 186. This was reiterated by the panel in US-offset Act (Byrd Amendment) with regard to non violation complaints under the semi agreement See Panel Report, US-offset Act (Byrd Amendment) para 7.125.


42 See Appellate Body Report, EC-Banaras III, Paras 132 and 133.
such action would be fruitful.\textsuperscript{43}

The Appellate Body explicitly agreed with the statement of the panel \textbf{in EC-Bananas III that} “With the increased interdependence of 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.”\textsuperscript{44}

\textbf{In Mexico-Cornsyrup (Article 21.5-US)} the Appellate Body ruled with respect to recourse by Members to the WTO dispute settlement system,

‘As per Article 3.7, panels and Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such a Member does so in good faith, having duly exercised its judgement 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 Judgement.’\textsuperscript{45}

A Member’s decision to start WTO dispute settlement proceedings is thus largely beyond judicial review. However, it is apparent from the success rate of complainants in WTO dispute settlement that members do indeed duly exercise their judgement as to whether recourse to WTO dispute settlement

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\textsuperscript{43} Ibid para, 135.
\textsuperscript{44} Ibid, para 136; Here the Appellate Body referred to Panel Reports. EC-Banaras III para 7.50.
\textsuperscript{45} Appellate Body Report, Mexico-Corn Syrup (Article 21.5 US) para 74 The Appellate body here referred to its earlier findings quoted in EC-Bananas III, para 135.
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will the ‘fruitful’. In 89 percent of all reports, panels agree with the complainants that respondent acted inconsistently with the WTO Law.46

4.3.7 Measures Subject to WTO dispute Settlement

We examine here the scope of the measures that can be challenged in WTO dispute settlement proceedings and focuses on three typical measures’

First measures by private parties

Second measures that are no longer in force and the

Third, Legislation as such rather than the actual application of this measure.

The question whether measures by private parties – the first category – can be challenged in WTO dispute settlement arises because the WTO agreement, 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.

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 action of government, not those of private parties.\textsuperscript{47}

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 intervention in the private action.\textsuperscript{48}

Therefore, each case will have to be examined on its facts to determine whether the level of Govt. involvement in actions of private parties is sufficient to make these actions challengeable measures.

The second category of ‘typical’ measures where the question arises whether they may be challenged in WTO dispute and settlement proceedings is that of measures that are no longer in force.

\textbf{In Indonesia – Autos}, Indonesia notified the panel that it had terminated its disputed National Car Programme. Nevertheless, the panel decided to examine the claims with regard to the programme. After mentioning that Indonesia had notified the termination after the dead line set for the submission of new facts.

\textbf{In US – Upland Cotton}, the Appellate Body stated, Whether or not a measure is still in force is not dispositive of whether that measure is currently affecting operation of any covered?

\textsuperscript{47} Panel Report, Japan – Film, para 10.52

\textsuperscript{48} Once sufficient government intervention by a member is established the presence of some element of private choice will not relieve the member of its responsibility, for example Korea – various measures on beef.
agreement. Therefore, we disagree with the U.S. argument that measures, whose legislature basis is expired, are incapable of affecting the operation of a covered agreement in the present and that accordingly, expired measures cannot be the subject of consultation under the DSU. In our view, the question of whether measure, whose legislature basis has expired, affect the operation of a covered agreement currently is an issue that must be resolved on the facts of each case. The outcome of such an analysis cannot be prejudged by excluding it from consultations and dispute settlement proceedings altogether.\textsuperscript{49}

The Appellate Body, thus explicitly confirmed that measures that are no longer in force can be the subject of consultations or examinations by panels, if they currently affect the operations of a covered agreement. However, the fact that a measure has expired may affect the recommendations a panel may make under Article 19.1 of the DSU.\textsuperscript{50} The current legal position on this matter was neatly summarized by the Paul in \textbf{EC-selected custom matter} which stated as follows:

“As a general principle, a panel is competent to make findings and recommendations on measures in existence at the time of establishment of the panel, assuming that the request for establishment of a panel covers those measures. Nevertheless a panel may also be competent to make findings and make recommendations in measures that have expired or are not in

\textsuperscript{49} Appellate Body Report, US – Upland Cotton, para 262

existence at the time of establishment, assuming again that the request covers those measures. More specifically, we understand that to the extent that expired measures affect the operation of a covered agreement at the time of establishment of a panel, they may properly be the subject of findings and recommendations by a panel, particularly, if such findings and recommendations are necessary to secure a positive solution to the dispute. Further measures that are not in existence at the time of establishment may be the subject of findings and recommendations by a panel when they come into existence, provided that they do not change the essential nature of the complaining member’s case reflected in the request for establishment of a panel.”

The third category of ‘typical’ measure refers to challenges to legislation as such. It is clear that the WTO inconsistency of the actual application of specific national legislation can be challenged in WTO dispute settlement proceedings. However, can national legislation as such be challenged in WTO dispute settlement procedures?

In US-1916 Act, 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 under Article XXIII 1(a) of the GATT 1947, it allowed a contracting party to challenge legislation as such independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistency considered

51 Panel Report, Ee – Selected customers matters, para 7.36
that under Article XXIII, they had the jurisdiction to deal with claims against legislation as such in examining such claims panels developed the concept, the mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that renders a violation of GATT obligation can be found as such to be inconsistent with those obligations."52

The practice of GATT panels was summed up in US – Tobacco as follows:

“Panels had consistently ruled that legislation which mandated action inconsistent with the general Agreement could be challenged as such, whereas, legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the general agreement could not be challenged as such, only the actual application of such legislation inconsistent with the General Agreement could be subject to change.53

WTO panels as well as the Appellate Body have followed the same practice.54 However, the panel in US – Section 301 Trade Act ‘refined’ the existing jurisprudence. The Panel in that case rejected the presumption, implicit in the argument of the United

States, that no WTO provision ever prohibits discretionary legislation. The panel explicitly stated that in rejecting the presumption, it did not imply a reversal of the classic text in the existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency could, as such violate the WTO provision. On the contrary that was the very test which the panel appealed, The panel argued, however, that

“It simply does not follow this test, as sometimes has been argued, that legislation with discretion could never violate the WTO. If, for example, it is found that the specific obligations in Article 23 of the DSU prohibits a certain type of legislative discretion, the existence of such discretion in the statutory language of section 304 would presumptively preclude WTO consistency”.

The panel then examined Article 23 of the DSU, the obligation at issue, in great detail. In this examination, the panel observed with regard to the nature of the obligation of Article 23 of the DSU.

According to the panel the duty of Members under Article 23 is to abstain form unilateral determination of inconsistency. It meant to guarantee Members, as well as the market place and those who operated in it, that no such determinations in respect of WTO rights and obligations will be made. The panel subsequently ruled with regard to the measure at issue. The panel concluded, that the statutory language of section 304 of

55 See Panel Report, US – Section 301 Trade Act, para 7.54
56 Ibid
57 Ibid paras 7.86 – 7.88
the Trade Act of 1974, although it was not mandatory but discretionary in nature, it was prima facie inconsistent with Article 23 of the DSU58. The Panel Report in US – Section 301 of the Trade Act was not appealed.

4.3.8 The Amicus Curiae Brief Issue

As stated elsewhere, the WTO dispute settlement system for disputes relating to rights and obligations of WTO Member, Individuals, Companies, International Organizations, Non Governmental Organizations etc have no direct access to the WTO dispute settlement system. They cannot bring claims of violations of WTO rights or obligations. Under the current rules they do not have any right to be heard or to participate in a proceeding. However, under Appellate Body case law, panels and the Appellate Body have the authority to accept and consider written brief submitted by individuals, companies or organizations. The acceptance by the panels and the Appellate Body of these briefs, which are commonly referred to as amicus curiae brief, (friend of the court’s brief) has been controversial and criticized by most WTO members.59

In US – shrimp, the Appellate Body noted with respect to the authority of panels to accept and consider amicus curiae briefs.

58 Ibid paras 7.95
59 Only Amicus Curiae briefs that were attached to the submission of the parties or third parties have generally been accepted; See the eg of Panel Report Us – Shrimp, Para 7.8, Appellate Body report, US – Shrimp, Para 81-91.
On the basis of Articles, 11, 12 and 13 of the DSU, the Appellate Body came to the conclusion that panels have the authority to accept and consider amicus curiae briefs and reverse the Panel’s findings to the contrary. A few panels in later disputes did, on the basis of this ruling of the Appellate Body in US – Shrimp, accept and consider amicus curiae briefs. This was the case in Australia – Salmon (Article 21.5 Canada) in which the panel accepted and considered a letter from, concerned fisherman and processors in South Australia. This letter addressed the treatment by Australia of, on the one hand, imports of pilchard for use as bait or fish feed and on the other hand, import of salmon. The panel considered the information submitted in the letter as relevant to the dispute before it and accepted this information as part of the record. In many other disputes, the panels refused to accept or consider amicus curiae briefs submitted in appellate review proceedings.

In considering Amicus curiae brief, nothing in the DSU or the working procedures specifically provides that the Appellate Body may accept and consider submission or brief from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the working procedures explicitly prohibit acceptance or consideration of such brief. However, Articles 17.9 of the DSU provides,

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60 See Panel Report, Australia – Salmon (Article 21.5 Canada) paras 7.8 – 7.9; In US – Soft wood Lumber III, the Paul accepted for consideration on unsolicited ‘amicus brief’. 
“Working procedure shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director General and be communicated to the Members for their information.

Until now the WTO Members have been unable to adopt any clear rules on amicus curiae brief. The Appellate Body has repeatedly confirmed its case law on the authority of Panels and the Appellate Body to accept and consider amicus curiae briefs. In no Appellate proceedings, the Appellate Body considered it useful in deciding on an appeal, to accept or consider amicus curiae brief submitted to it.

The amicus curiae brief submitted by Moroco in the Appellate proceedings in EC – Sardines is of particular interest. Moroco was the first WTO Member to file amicus curiae brief. As per the complaint in EC – Sardines, …..argued that the Appellate Body should not accept or consider this brief. In considering the issue the Appellate Body first recalled its case law on amicus curiae brief, and then noted.

“We have been urged by the parties to this dispute not to treat Members less favorably than non-Members with regard to participation of amicus curiae. We agree, that we have not and we will not, as we have already determined that we have the authority to receive an amicus curiae brief from private individual or an organization, a ‘Portion’, we are entitled to accept such a brief from WTO Members, provided there is no
prohibition on doing so in the DSU. We find no such provision."61

The Appellate Body, therefore, concluded that it was entitled to accept the amicus curiae brief submitted by Morocco and consider it.62 However, the Appellate Body emphasized that, in accepting the brief filed by Morocco in this appeal, it was not suggesting that each time a Member filed such a brief, it would be required to accept and consider it. The Appellate Body noted,

To the contrary, acceptance of any amicus curiae brief is a matter of discretion, which we must exercise on a case by case basis.

Thus, it had the authority to accept the amicus curiae brief filed by Morocco. The Appellate Body then considered whether this brief could assist it in this appeal, Morocco’s Amicus curiae brief provided mainly factual information. The Appellate Body, therefore, ruled on the relevance on these parts of Morocco’s brief.

Morocco also put forward arguments relating to legal issues.63 But the Appellate Body decided not to make findings on these specific issues and, therefore, Morocco’s arguments on these issues did not assist the Appellate Body in this appeal.64 If the Appellate Body had made findings on these issues, it would

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61 Appellate Probly Report, Ec – Sardines, para 164.
62 Ibid, para 167
63 Morocco brief contend arguments relating to Article 2.1 of the TBT Agreement and the GATT 1994.
64 See Appellate Body Report, Ec- Sardines, para 314.
arguably have accepted and considered the relevant part of Moroco’s amicus curiae brief.

4.3.9 Indirect Access for Private Parties

A large number of disputes heard by the WTO are disputes brought by governments at the instigation of an industry or a company. For example, in Japan – film, it was Kadak which masterminded and actively supported the US claim against Japan.

In EC – Bananas III, Chiquita played a central role in the United States’ involvement in this dispute. As Qentin Peel reported in the Financial Times,

‘Even in the incestuous world of trade policies in Washington, where deals are done behind closed doors’ and lobbyists reign supreme, they talk of Carl Linder in hushed tones.”

If the present words between the US and the European Union over Banana come to real blows, his influence will certainly be seen too critical. This veteran financier, so next year, has succeeded almost single handedly in turning a row about someone else’s exports and other people’s role into an issue of principle for the US Government and the possible course of serious rift in relations with its biggest trading partner.

And yet no one admits to surprise. It is a text book case of how trade policy works in this city, says a diplomat, closely involved in trade talks. It is driven by very narrow interest groups, and nobody is prepared to stand up to this.
Mr. Lindner is a banana baron, although a thoroughly unlikely one. He is chairman and Chief executive of Chiquita Brands International, the largest banana producer and trader in the world with some 26 percent of the market.

In 1993, the EU introduced new rules to discriminate in favour of buying Caribbean bananas, and therefore squeezed the share of Chiquita’s dollor bananas from one of its most lucrative markets. Since then Mr. Lindner has lined up a remarkable bipartisan battery of political heavy weights to gun for him in the capital.

Headed by Bobe Dole, the former Senate majority leader, and Trent Lott, his successor as majority leader, it includes, Newt Gingrich, the former speaker of the House of Representatives, Senator John Glenn of Ohio and space fame and congressman Richard Gephardt, the Democratic House leader. All wrote letters to President Clinton and Mickey Kantor, then US Trade Representative, urging tough counter measures against the EU. They also tried to bring down the wrath of the US on any Central American Country that dared to break ranks and join the EU Carter

Companies or Industry association will not only lobby governments to bring dispute settlement cases to the WTO, but they (and their law firms) will often also play an important, ‘behind the scenes’ role in planning the legal strategy and drafting the submissions.

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The legal system of some WTO members explicitly provides for the possibility for industry associations and/or companies to bring a violation of WTO obligations by another WTO Member, to the attention of this government and to induce their government to start WTO dispute settlement proceedings against that Member. In EC law this possibility is provided for under the Trade Barriers Regulations. In US Law, under section 301 of the 1974 Trade Act and the Chinese Law, under the Investigation Rules of foreign Trade Barriers. 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 this respect, industry associations and individual companies have indirect access to WTO dispute settlement system.

4.4 The WTO Dispute Settlement Process

The WTO dispute settlement process has four major steps, such as

1. Consultation
2. Panel proceedings
3. Appellate review proceedings and
4. Implementation and enforcement

The dispute settlement process begins with consultations or at least an attempt by the complainant to involve the respondent

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66 Council Regulations (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, L 349, 71 as amended by Council regulations (Ee) Np 356/95. OJ 1995 L. 41.3
in consultations to resolve the dispute in a very cordial way. If that is not possible, the complainant can refer the matter of dispute to a panel for adjudication. The panel proceedings will result in a panel report. This report can be appealed to this Appellate Body. The appellate review proceedings will result in an Appellate Body report, upholding, modifying or reversing the panel report. The panel report or Appellate Body report, in the case of appeal, will be adopted by the Dispute Settlement Body. After the adoption of the reports, the respondent, if found to be in breach of WTO law, will have to implement the recommendations and rulings adopted by the DSB. This implementation and enforcement of the adopted recommendations and rulings constitutes the last major step in the WTO dispute settlement process.
Dispute Settlement Process

Figure 4.1

<table>
<thead>
<tr>
<th>60 days by 2nd DSB meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-20 days before second meeting</td>
</tr>
<tr>
<td>20 days (+10 if Director-General asked to pick panel)</td>
</tr>
<tr>
<td>6 months from panel’s composition, 3 months if urgent</td>
</tr>
<tr>
<td>up to 9 months from panel’s establishment</td>
</tr>
<tr>
<td>60 days for panel report unless appealed</td>
</tr>
<tr>
<td>‘REASONABLE PERIOD OF TIME’: determined by member proposes, DSB agrees or parties in dispute agree or arbitrator (approx. 15 months if by arbitrator)</td>
</tr>
<tr>
<td>30 days after ‘reasonable period’ expires</td>
</tr>
</tbody>
</table>

Consultations (Art.4)

Panel established by Dispute settlement Body (DSB) (Art.6)

Term of reference (Art.7)
Composition (Art.8)

Panel examination
 Normally 2 meetings with parties (Art.12)
 1 meeting with third parties (Art.10)

Interim review stage
 Descriptive part of report sent to parties for comment (Art.15.1)
 Interim report sent to parties for comment (Art.15.2)

Expert review group (Art.13, Appendix 4)

Review meeting with panel upon request (Art.15.2)

DSB adopts panel/appellate report(s) including any changes to panel report made by appellate report (Arts. 16.1, 16.4 and 1/16)

Implementation report by losing party of proposed implementation within reasonable period of time (Art.21.3)

Dispute over implementation: Proceedings possible, including referring to initial panel on implementation (Art. 21.5)

In cases of non-implementation parties negotiate compensation pending full implementation (Art.22.2)

Possibility of arbitration on level of suspension producers and principles of retaliation (Art. 22.6 and 22.7)

Panel report issued to parties (Art.12.8, Appendix 2 par. 12(k))

Panel report issued to DSB (Art.12.9, Appendix 3 par. 12(k))

Appellate review (Arts. 16.4 and 17)

During all stages good offices, conciliation, or mediation (Art.5)

NOTE: a panel can be ‘composed’ (i.e., Panelists chosen) up to about 30 days after its ‘establishment’ (i.e., after DSB’s decision to have a panel)

TOTAL FOR REPORT ADOPTION: Usually up to 9 months (no appeal), or 12 months (with appeal), from establishment of panel to adoption of report (Art.20)

Source: WTO Publication
### Time Frame of WTO Dispute Settlement Process

**Table 4.1**

<table>
<thead>
<tr>
<th>Time Allowed</th>
<th>Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>60 days</td>
<td>Consultation, Mediation etc.</td>
</tr>
<tr>
<td>45 days</td>
<td>Panel set up and Panelists appointment</td>
</tr>
<tr>
<td>6 months</td>
<td>Final Panel report to parties</td>
</tr>
<tr>
<td>3 weeks</td>
<td>Final Panel report to WTO Members</td>
</tr>
<tr>
<td>60 days</td>
<td>Dispute Settlement Body reports (if no appeal)</td>
</tr>
<tr>
<td>Total 1 year</td>
<td>(without appeal)</td>
</tr>
<tr>
<td>60-90 days</td>
<td>Appeal report</td>
</tr>
<tr>
<td>Total = 1 year 3 months</td>
<td>(with appeal)</td>
</tr>
<tr>
<td>30 days</td>
<td>Dispute Settlement Body adopts appeal report</td>
</tr>
<tr>
<td>Total = 1 year 3 months</td>
<td>(with appeal)</td>
</tr>
<tr>
<td>15 months</td>
<td>Time to implement (Maximum without appeal)</td>
</tr>
<tr>
<td>Up to 18 months</td>
<td>With appeal</td>
</tr>
<tr>
<td>Total = 2 year 6 months</td>
<td>Without appeal</td>
</tr>
</tbody>
</table>

Source: WTO Publication
4.4.1 Time frame for the WTO dispute Settlement Process

The most striking features of the WTO dispute settlement system is the Short Time Frame within which the proceedings of both panels and Appellate Body must be completed. The time frame for consultations and implementation are also strictly regulated. As per that time frame the panel proceedings should be completed within Nine months.\(^{67}\) In effect, panel proceedings often exceed this time limit. On an average, panel proceedings extend approximately to twelve months.\(^{68}\) Appellate Body proceedings shall not exceed ninety days.\(^{69}\) In practice, Appellate Body keeps this time limit. No other international court or tribunal operates under severe time limits. These time limits have been severely criticized as being, too short and demanding for both the parties to the dispute and the Appellate Body. Owing to the restrictions with regard to the time limit, there is no back log of cases at either the panel or appellate level. Moreover, it is of great importance that the dispute settlement process is short, and comes to determination regarding the WTO consistency of the measure at issue quickly, since the WTO dispute settlement system does not provide for compensation of damages caused by the measure at issue during the time that the dispute settlement process is running.\(^{70}\) In cases of urgency, half of the normal time limit

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\(^{67}\) See Article 12.9 of the DSU  
\(^{68}\) See the WTO web site www.WTO.org/English the WTO-e what is  
\(^{69}\) See Article 17.5 of the DSU  
\(^{70}\) For a detailed discussion on the duration of the Appellate review proceedings, see the subsequent pages.
apply for both panel and Appellate review proceedings. This is applicable to disputes relating to perishable goods and prohibited subsidies under SCM Agreement.71

4.4.2 Rules of Interpretation and Burden of Proof:

The rules of interpretation and the rules of burden of proof are very important to the dispute settlement system. These rules, as applied to WTO, are discussed here under.

4.4.3 Rules of Interpretation

Article 3.2 of the DSU stipulates in relevant part that the dispute settlement system serves, to clarify the existing provisions of (the covered) agreements in accordance with customary rules of interpretations of public international law.

In US – Gasoline, the Appellate Body noted:

“The 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 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 classify the provisions of the General Agreement and the other covered agreements of the Marrakash Agreement Establishing the World Trade Organisation (The WTO Agreement). That direction

71 See Article 4.9, 12.8 and 17.5 of the DSU and Article 4 of the SCM Agreement. A panel must circulate its report within 90- days of the date of its composition.
reflects a measure of recognition that the General Agreement is not be read in clinical isolation from public international law.”  

In Japan – Alcoholic Beverages II, the Appellate Body added:

“There can be no doubt that the 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)

Article 31 of the Vienna Convention of the Law of Treaties entitled General Rule of Interpretations states:

1. 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 objects and purpose.

2. The context for the purpose of interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes.

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty

(b) 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.

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72 Appellate Body Report, Us – Gasoline - 16
3. There shall be taken into account together with the context.

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretations.

(c) Any relevant rules of international law applicable in the relation to between the parties.

(d) A special meaning shall be given to a term if it is established that the parties so intended.

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 appreciation of Article 31 or to determine the meaning when the interpretation according to Article 31.

(a) leaves the meaning ambiguous or obscure

(b) or leads to a result which is manifestly absurd or unreasonable.

Consequently, panel and Appellate Body interpret provisions of the covered agreements in accordance with the ordinary
meaning of the words of the provision taken in their context and in the light of the object and purpose of the agreement involved. If necessary and appropriate, panels and Appellate Body have recourse to supplementary means of interpretation.73

The duty of an interpreter is to examine the words of the treaty to determine the common intention of the parties to the treaty.74

The Panel in **US-Corrosion – Resistant steel sunset Review** 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.75

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 the treaty.

**In India-Patents (US), 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.76

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73 Note that the Appellate Body Report in Ec-chicken cuts contains useful clarification of the concepts of ordinary meaning. (See para 170-87).

74 See Appellate Body Report, India-Patent (US) para 45 and AB Repot EC-Computer equipment para 84.

75 Panel Report, US-Corrosion Resistant Steel Sunset Review, para 7.44.

76 Appellate Body Report, India-Patents (US), Para 45.
The importance of other international law in the interpretation of WTO agreements is evident from Article 31.3(c) of the Vienna convention on the Law of treaties.

**In US-Shrimp**, the Appellate Body referred to this provision and noted that its task is to interpret the language of the chapean (of Article XX of the GATT 1994) seeking additional interpretation guidance, as appreciate from the general principles of international law.\(^77\)

### 4.4.4 Burden of Proof

There is no specific rule in the DSU with regard to the Burden of proof for settlement of WTO disputes. However, **In US-Wool Shirts and Blouses, the Appellate Body noted**, "We find it difficult to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals including ICJ have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent is responsible for providing proof thereof. Also it is a generally accepted canon of evidence in civil law, common law and in most jurisdictions that the burden of proof rests upon the party whether complaining or defending, who asserts the affirmative of a particular claim or defence, if that party addresses evidence sufficient to raise a presumption that what is claimed is true; the burden then shifts to the other party who

\(^77\) Appellate Body Report, US-Shrimp, para 158.
will fail unless it addresses sufficient evidence to rebut the presumption.\textsuperscript{78}

**In EC-Harmones, the Appellate Body** further classified the burden of proof in WTO dispute settlement proceedings and stated with respect to disputes under SPS Agreement,

The initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a particular provision of SPS Agreement on the part of defending party or more precisely of its SPS measure or measures complained about. When that prima facie case is made the burden of proof moves to the defending party which must intern counter or refute the claimed inconsistency.

It is also well to remember that a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting a prima facie case.\textsuperscript{79}

### 4.4.5 Confidentiality and Rules of Conduct

In this section, we discuss the confidential nature of the WTO dispute settlement. Along with it, it examines the rules of conduct that apply to those involved in WTO dispute settlement.


\textsuperscript{79} Appellate Body Report, Ec-Hormones, paras 98 and 104.
4.4.6 Secrecy of the proceedings

The WTO dispute settlement proceedings are confidential in nature. Consultations, Panel proceedings and Appellate Body review proceedings are all confidential. The meetings of the DSB also take place behind closed doors. All written submissions to a panel or to the Appellate Body by the parties and third parties to a dispute are confidential. 80 Only parties may make their own submissions available to the public. 81 Most parties choose to keep their submissions confidential. There is a provision in the DSU that a party to a dispute must, upon request of any WTO Member, provide a non-confidential summary of the information contained in its submissions to the panel. That could be disclosed to the public. 82 But this provision does not provide for a deadline by which such a non-confidential summary must be made available.

The interim as well as the final report of the Panel, so long as it has been issued to the parties to the dispute, are also confidential. The final panel report, when it is circulated to all WTO Members, becomes a public document. The report (interim and final) issued to the parties are often ‘leaked’ to the media. In US-Gambling, the Panel regretted the breach of the duty of confidentiality by the parties, and stated that disregard for the confidentiality requirements contained in the DSU affects the credibility and integrity of the WTO dispute settlement

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80 See Articles 18.2 and 17,10 and Appendix 3, para 3 to the DSU.
81 See Panel Report, Argentina-Poultry Anti Dumping Duties paras 7.3-7.16.
82 See Article 18.2 of the DSU.
process of the WTO and its Members, and is therefore unacceptable.83

Unlike Panel Reports, Appellate Body Reports are not first issued to the parties; week later, they are issued to the parties and WTO Members simultaneously. The Appellate Body Report becomes a public document of that moment when it is issued to both (Parties and Members).

The meetings of the panel with the parties as well as the hearings of the Appellate Body generally take place behind closed doors. As a rule, nobody except the parties themselves and the officials of the WTO secretariat assisting the panel are allowed to attend all meetings of the panel with the parties. The hearings of the Appellate Body may only be attended by the participants and third participants in the appellate review proceedings as well as the staff of the Appellate Body secretariat.

The 2004 Southerland Report states,

“The degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution”84

The Report, therefore, recommended that, as a matter, of course, the Panel meetings and Appellate Body hearings be generally open to the public.85

4.4.7 Rules of Conduct

When hearing and deciding a WTO dispute, panelists, arbitrators and Appellate Body members are subject to the rules of conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Rules of Conduct). To preserve the integrity and impartiality of the WTO dispute settlement system, the Rules of Conduct require that panelists, arbitrators and Appellate Body Members will be independent and impartial, shall avoid direct and indirect conflicts of interest, and shall respect the confidentiality of proceedings.

The staff of the WTO Secretariat, Appellate Body Secretariat and experts consulted by panels are also subject to these Rules of Conduct.

To ensure compliance with Rules of Conduct, all persons to whom the rules apply must disclose the existence or development of any interest, relationship on matters that a person could reasonably be expected to know, and that is likely to affect or give rise to justifiable doubts as to that person’s independence or impartiality.

This disclosure obligation includes information on financial, professional and other active interests as well as statements of

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85 See Ibid, para 262.
86 WT/DSB/RC/1, dated 11 December 1996.
87 Pat. 11(1) of the Rules of Conduct.
88 Para iii(1) of the Rules of Conduct.
personal of opinion on issues relevant to the dispute and employment of family interests.89

Parties can request the disqualification of a panelist on the ground of material violation of the obligation of independence, impartiality, confidentiality or the avoidance of direct or indirect conflict of interest.90 The evidence of such material violation is provided to the chairman of the DSB, who will, in consultation with the Director General of the WTO and the Chairperson of the relevant WTO bodies, decide whether a material violation has occurred, if it has, the panelist replaced. Parties can also request the disqualification of an Appellate Body Member on the ground of material violation of the obligation of Rules of Conduct. It is however, for the Appellate Body and not for the Chairman of the DSB to decide whether a material violation has occurred, and, if so, to take appropriate action.91 So far, no case has been reported about violation of Rules of Conduct against a panelist or an Appellate Body Member.

4.4.8 Remedies for Breach of Conduct

As per DSU provision, there are three types of remedies available for breach of WTO Law.

One, final remedy, viz withdrawal of WTO inconsistent measure (or amendment) and two temporary remedies which can be applied awaiting the withdrawal (or amendment) of the WTO inconsistent measure, namely compensation and retariation.

89 See Annex 2 to the Rules of Conduct.
90 See para VIII of the Rules of Conduct
91 See Ibid.
Article 3.7 suggests that the withdrawal of the WTO inconsistent measure should normally be immediate.92

Article 19.1 of the DSU provides, where a panel or an 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 the agreement.93 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.

Article 3.7 of the DSU refers to the withdrawal of the measure found to be WTO inconsistent, the withdrawal or the amendment of the WTO inconsistent aspect or element 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 ruling, i.e., prompt or immediate withdrawal or amendment of the WTO inconsistent measure, is essential to the effective functioning of the WTO, and is the primary obligation. However, if it is impracticable to comply immediately with the recommendation and rulings, the Member concerned, has, pursuant to Article 21.3 of the DSU, a reasonable period of time in which to do so.

92 Article 3.7 provides: The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable.

93 Pursuant to Article 19.1 of the DSU, they can only recommend that the Member concerned bring its measure into WTO conformity.
The reasonable period of time for implementation may be

1. Determined by the DSB
2. Agreed on by the parties to the dispute, or
3. Determined through binding arbitration at the request of either party.94

Article 21.2 of the DSU requires that in determining the reasonable period of time for implementation, particular attention should be paid to matters affecting the interest of developing Country Members. On that legal basis, the Arbitrator in Indonesia-Autos ruled,

“Indonesia is not only a developing country, but is currently in a dire economic and financial situation. Indonesia itself states that its economy is near collapse. In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country in accordance with the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six month period required for the completion of Indonesia’s domestic rule-making process constitute a reasonable period of time for completion of the recommendations and rulings of the DSB in this case.”95

In EC-Export subsidies on sugar, an Arbitrator, for the first time, authoritatively held that Article 21.2 directs an arbitrator

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94 See Article 21.3(a), (b) and (c) of the DSU.

95 Award of the Arbitrator, Indonesia-Autos (Article 21.3(c)) para 24.
to pay attention to matters affecting the interest of both complaining and implementing Developing Country Members.96

Previously, there was considerable doubt as to which developing country Member, the provision pertaining to.97 Agreeing with the Arbitrator in US-Gambling98, the Arbitrator in EC-Export subsidies on sugar ruled that there was nothing in the text of Article 21.2 of the DSU that suggested that the developing country Member referred to therein could only be an implementing Member. However, the fact that the parties to a dispute are developing country Members do not ‘ipso facto’ after the determination of the period of implementation unless these Members are able to substantiate why the otherwise normal period of implementation should cause them hardship (as either implementing or complaining Members).99

The reasonable period of time for implementation determined by the arbitrator is upto six months. However, the overall period of compliance with the recommendations and rulings adopted by

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96 Award of the Arbitrator, EC-Export subsidies on sugar (Article 21.3(c)) para 99. The complaining Developing Country Member in EC-Export Subsidies on sugar, of which the interest had to be taken into account, was Brazil.

97 Previously when this question arose. Article 21.2 to implementing Member was the answer. See Award of the Arbitrator. EC-Export subsidies on sugar (Article 21.3(c)) Foot note para 1.92-1.99. However, that question as to whether the developing country Member, could even be a Member not party to the dispute was not addressed, Ibid.

98 See Award of the Arbitrator, US-Gambling (Article 21.3(c)) para 59.
See also Award of the Arbitrator EC-chicken cuts (Article 21.3(c)) para 82.

99 See the Award of the Arbitrator, US-offset Act (Byrd Amendment) (Article 21.3(c)). Para 81; EC-Tariff preferences, para 59 and US-Oilcompay Tabular Goods Sunset Review, para 52.
the DSB is quite positive and encouraging. One can conclude on the basis of records of compliance that the WTO dispute settlement system works well.

**4.4.9 Compensation and Retaliation**

Only the withdrawal or amendment of the WTO inconsistent measure constitutes a final remedy for breach of WTO Law... However, if a Member has not withdrawn or amended the WTO inconsistent measure by the end of a reasonable period of time for implementation, the DSU provides for the possibility of recourse to temporary remedies: such as:

1. Compensation; or

2. Suspension of concessions or other obligations

As per Article 22.1 of the DSU. (only relevant part)

Compensation and suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time; neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.

For the DSU compensation and or suspension of concessions or other obligations are not alternative remedies which Members may want to apply, instead of complying with the

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100 See B. Wilson; Compliance by WTO Members with Adverse WTO. Dispute Settlement Rulings, The Format of International Economic Law 2007, p.397.
recommendations and rulings. Compensation and suspension of concessions are remedies which are only applied until implementation takes place.

Compensation within the meaning of Article 22 of the DSU is voluntary and forward looking i.e., both parties have to agree on the compensation, and the compensation concerns only damages that will be suffered in the future. Compensation must be consistent with the covered agreements. So far parties have been able to agree on compensation in very few cases.

In ‘Japan-Alcoholic Beverages II’, for example, the parties agreed on compensation which took the form of temporary additional market access for certain products of export interest to the original complainants.

The suspension of concessions or other obligations, commonly referred to as retaliation, is very different in nature from compensation. There is no need for the parties to agree, when the reasonable period of time for implementation has expired and the parties have not been able to agree on compensation,

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101 See 2004 Southerland Report, it has been even argued by some that the WTO Members finding itself in a losing position in the WTO dispute settlement system has a free choice on whether or not to actually implement that obligations spelled out in the adopted Appellate Body or Panel Report; the alternatives being simply to provide compensation on endure relation. This is an erroneous belief consultative Board to the Director General Supachai Panitchpakdi. The future of the WTO addressing institutional changes in the New Millennium (the Southerland Report) (WTO 2004) Para 241.

102 See Articles 22.1 and 22.8 of the DSU.

103 See Article 22.1 of the DSU.
the injured party may request authorization from the DSB to retaliate against the offending party by suspending concessions or other obligations with respect to that offending party. Since the DSB decides on such a request by reverse consensus, the granting of authorization is quasi-automatic.

Retaliation often takes the form of a drastic increase in the customs duties on strategically selected products of export interest to the offending party.\textsuperscript{104} Retaliation thus puts economic and political pressure on the offending party to comply with the recommendations and rulings. The producers and traders of the products hit by the increased duties will lobby furiously for the withdrawal or amendment of the WTO inconsistent measure.

If the violation of WTO law relating to an obligation regarding trade in goods, or regarding trade in financial services or regarding the protection of patents, suspension of concessions or other obligations should be sought in the same sector. If this is not practicable, or effective, this suspension may be sought in another sector or under another agreement. This is known as cross-retaliation. Cross retaliation is seldom requested.

**In EC-Bananas III, Ecuador requested** and the DSB authorized the suspension of concessions or other obligations under

\textsuperscript{104} In Ec-Bananas III for eg. The United States increased customs duties on carefully selected products from the European Communities to 100 percent ad volorem. See Panel Report, EC-Bananas III (Article 21.5 Ec) para 2.3.
another agreement (the TRIPS Agreement) than the agreements at issue in that dispute (The GATT 1994 and GATS).  

**In US-Gambling**, a dispute in which the Panel and Appellate Body found that the United States measures at issue were inconsistent with the GATS, Antigua and Barbuda, hereinafter referred to as Antigua, requested authorization to suspend concessions or other obligations under the GATS and the TRIPS Agreements.  

Antigua requested authorization to suspend concessions on other obligations for an amount of 3.4 billion dollars a year. With regard to the level of suspension of concession or other obligations Article 22.4 of the DSU states,

“"The level of suspension of concession or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment."’

### 4.4.10 Other Remedies for Breach of WTO Law

As per general international law, a breach of an international obligation leads to certain legal consequences relating to responsibilities. The first legal consequence of international responsibility is the obligation to cease the illegal conduct.  

According to ILC Articles on state responsibility, the injured

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105 See decision by Arbitrator, EC-Bananas III (Ecuador) (Article 22.6-Ec, Para1.

106 See Recourse by Antigua and Barbuda to Articles 22.2 of the DSU, WT/DS/285/22, dated June 2007.

107 See ILC Articles on State responsibility; Para 2, Article 6.
state is further more entitled to claim full reparation in the form of

1. restitution in kind,
2. compensation,
3. satisfaction and
4. assurance and guarantee for non-repetition.\(^{108}\)

Restitution in kind means that the wrong doing state has to reestablish the situation that existed before the illegal act was committed.\(^{109}\)

In very specific circumstances, repayment of sums, illegally received may also constitute a remedy for breach of WTO law. Article 4.7 of the SCM Agreement states that, if a measure is found to be prohibited subsidy the, panel shall recommend that the subsidizing Member withdraw the subsidy without delay.

**In Australia – Automatic leather II** (Article 21.5-US) the panel examined whether the recommendation to withdraw the subsidy in Article 4.7 of the SCM Agreement can properly be understood to encompass repayment. The panel concluded that

"In the circumstances of this case, repayment is necessary in order to withdraw the prohibited subsidies found to exist. As discussed above, we do not find any basis for repayment of anything less than the full subsidy. We, therefore, conclude that

\(^{108}\) See Ibid, Article 6 bis.

\(^{109}\) Compensation under Article 22 of the DSU concerns only damages that will be suffered in the future.
repayment in full of the prohibited subsidy is necessary in order to ‘withdraw the subsidy’ within case.”

In our view, the required repayment does not include any interest component. We believe that withdrawal of the subsidy was intended by the drafters of the SCM Agreement to be the specific and effective remedy for violation of the prohibition in Article 3.1(a). However, we do not understand it to be a remedy intended to fully restore the status quo and by depriving the recipient of the prohibited subsidy of the benefits it may have enjoyed in the past. Nor do we consider it a remedy intended to provide reparation or compensation in any sense. A requirement of interest would go beyond the requirement of repayment encompassed by the term “withdraw the subsidy,” and is, therefore, we believe, beyond any reasonable understanding of that term.\textsuperscript{110}

4.5 Special Rules and Assistance for Developing Country Members

Developing country Members have made much use of the WTO dispute settlement system. From 2000 to 2006 Developing Country Members, as a group, have brought more disputes to the WTO than developed country Members until 2007; Brazil lodged 23 complaints; India 17 complaints, Mexico –17 complaints, Argenteena-14 complaints, Thailand – 12 complaints and Chili-10 complaints. They are among the biggest

\textsuperscript{110} Panel Report, Australia-Automatic Leather II (Article 21.5 US) Paras 6.48 and 6.49.
users of this system. The 2004 Southerland Report observed, with regard to the record of complainants under the WTO dispute settlement system,

“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 present) are increasingly taking on the most powerful, that is how it should be.”

4.5.1 Special Rules for Developing Country Members

The DSU realized the difficulties facing the Developing Country Members when they involved in the WTO dispute settlement. Therefore, DSU contains some special rules for Developing Country Members. Such special rules are found in Article 3.12 (regarding application of 1966 decision) Article 4.10 (regarding consultation and time to prepare and present arguments). Article 12.11 (regarding the constants of panel report). Article 24 (regarding least developed countries) and Article 27 (on the assistance of WTO secretariat. The most part of these special rules have not been used much till-date. Developing country Members criticize the fact that many of these provisions are


merely hortatory in nature. Some of these provisions are discussed hereunder.

4.5.2 Legal Assistance for Developing Country Members

Many of the Developing Country Members do not have the ‘in-house’ legal expertise to participate effectively in WTO dispute settlement. For example from the Appellate Body Ruling in EC-Bananas III it is clear that the WTO Members can be assisted and represented by private council in WTO dispute settlement proceedings. The Appellate Body noted in its ruling,

“That representation by a 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”

However, assistance and representations by private counsel has its costs, and such costs may be quite burdensome to Developing Country Members.

The WTO secretariat assists all Members in respect of a dispute settlement, when they so request. The DSU recognizes that there may be a need to provide additional legal advice and assistance to Developing Country Members. Article 27.2 of the DSU requires that WTO secretariat make qualified legal expert available to help any Developing Country Member that so requests.

Effective legal assistances for Developing Country Members in dispute settlement proceedings is given by the Geneva-based Advisory Centre on WTO Law (ACWL). The ACWL is an
independent inter-governmental organisation (fully independent from the WTO) which functions essentially as a Law-office specialized in WTO Law, providing legal services and training exclusively to developing countries and economy-in-transition members of the ACWL and all least developing countries. The ACWL provides support to all stages of WTO dispute settlement proceedings at discounted rates.
Chapter V

MACHINERY OF WTO DISPUTE SETTLEMENT