CHAPTER-VI

DISPUTE SETTLEMENT MECHANISM
UNDER WTO

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THE DISPUTE SETTLEMENT MECHANISM UNDER WTO

Developing countries need access to foreign markets if they are to reap the benefits of globalization. Multilateral negotiations under the World Trade Organization (WTO) play a pivotal role in facilitating market access. Yet, throughout the global economy, pressures of protectionism abound, threatening to roll back these gains. As a result, the WTO's dispute settlement mechanism is widely seen as one of the most critical-and successful-features of the trade regime. Using this mechanism, WTO member states can shine the spotlight of international legal scrutiny on the restrictive practices of their trading partners. This rule of law system is especially important for developing countries, which typically lack the market size to exert much influence through more power-oriented trade diplomacy. Indeed, some poorer countries have used the WTO dispute settlement system to great effect, proving the system's worth from a development perspective. Nonetheless, the technical and legal complexity of this regime makes it difficult for other developing countries to effectively use the system, many of which have never filed a WTO dispute, despite having repeated grounds to do so.

Formal dispute settlement at the WTO is a last resort option. It is preferable that countries should solve their differences among themselves, whether bilaterally plurilaterally or multilaterally. Many differences between Members are unlikely ever to become an issue at the WTO, and even if they do, they will not necessarily trigger formal

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1 Marc L. Busch, The WTO Dispute Settlement Mechanism and Developing Countries Queens School of Business Journal February, 2004
dispute settlement procedures. Some issues are settled at the committee level or defused in that context. Nevertheless, in the case where two or more Members of the WTO have a dispute and are unable to come to a solution among themselves, they have the right to bring the dispute to the WTO.

The WTO secretariat cannot challenge any Member, it has no right to prosecute. It is up to governments to decide whether or not to bring a dispute against another government to the WTO. And it is also entirely up to the complainant to argue its case. The dispute is only between governments, and only about alleged failures to comply with WTO agreements or commitments. So, for example, a government cannot complain about another government’s health policy as such. It can only complain if it believes a particular measure breaks an agreement or commitment that the other government has made in the WTO. Companies, organizations or private individuals cannot complain directly to the WTO, but can do so through their governments.

The Dispute Settlement Understanding stresses 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”, if a country is found to be at fault with the rules, it is expected to promptly correct the measure at issue. Moreover, it must state its intention to do so at a DSB meeting held within 30 days of the report’s adoption. If immediate compliance with the recommendation proves impractical, the country will be allowed a “reasonable period of time”. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine temporary compensation— for instance, tariff reductions in areas of
particular interest to the complaining side. There is no financial compensation. If no satisfactory compensation is agreed, the complaining side may ask the DSB for permission to impose limited trade sanction for instance suspension of concessions or obligations against the other side. If requested the DSB must grant this authorization, WTO Arbitration on the level of such sanctions can also be requested if the parties do not agree.

The dispute settlement mechanism monitors how adopted rulings are implemented, and any outstanding case remains on its agenda until the issue is resolved.

There are various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consults each other in order to settle out of court. Also at all stages the WTO Director-General is available to offer his good offices, to mediate or to help achieve conciliation.

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2 WTO Agreement and Public Health, a joint study by the WHO and the WTO Secretariat 2002 p.54.
WTO BODIES INVOLVED IN THE DISPUTE SETTLEMENT PROCESS

(i) The Dispute Settlement Body (DSB)

The WTO's dispute settlement arrangements are supervised by a single Dispute Settlement Body (DSB), on which all WTO Members are represented. The DSB is in fact the WTO's General Council Only the Members that have signed on to a particular "plurilateral" agreement
may participate in DSB decisions concerning that agreement. DSB is chiefly responsible for implementation of the rules and regulations relating to intergovernmental disputes. Like the General Council, the DSB is composed of representatives of all WTO Members. These are government representatives, in most cases diplomatic delegates who reside in Geneva (where the WTO is based) and who belong to either the trade or the foreign affairs ministry of the WTO Member they represent. As such, the DSB is a political body: The DSB is responsible for administering the DSU.

The DSB has authority to establish disputes panels, adopt panel reports, maintain surveillance of implementation of its own rulings and recommendations, and in the last resort authorize suspension of concessions (trade retaliation).\(^3\)

In less technical terms, the DSB is responsible for the referral of a dispute to adjudication (establishing a panel), for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing "retaliation" when a Member does not comply with the ruling. Article 2 of the Dispute Settlement Understanding deals with the Administration of the Dispute Settlement Body.

Accordingly, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered

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\(^3\) Nripendra Misra, Disputer settlement Mechanism under he World Trade Organization: Experience and Emerging problem, Charter Secretary, Volume No. XXXII, January 2002
agreements. With respect "to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" refers only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement only these Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

The DSB has its own chairperson, who is usually one of the Geneva-based ambassadors, i.e. a chief of mission of a Member's permanent representation to the WTO. The chairperson is appointed by a consensus decision of the WTO Members.

(ii) The Director-General and the WTO Secretariat:

Under DSU, the Director General of the WTO may offer good offices, conciliation or mediation to help members settle their dispute amicably. The Director-General of the WTO may, acting in an ex officio capacity, offer his/her good offices, for conciliation or mediation with a view to assisting Members to settle a dispute (Article 5.6 of the DSU). In a dispute settlement procedure involving a least-developed country Member, when a satisfactory solution has not been found during consultations, the Director-General will, upon request by the least-developed country Member, offer his or her good offices, for conciliation or mediation in order to help the parties resolve the dispute, before a request for a panel is made (Article 24.2 of the DSU). The Director-General convenes the meetings of the DSB and appoints panel members upon the request of either party, and in consultation with the Chairman of the DSB and the Chairman
of the relevant Council or Committee, where the parties cannot agree on
the composition within 20 days (Article 8.7 of the DSU). The Director-
General also appoints the arbitrators for the determination of the
reasonable period of time for implementation, if the parties cannot agree
on the period of time and on the arbitrator, or for the review of the
proposed suspension of obligations in the event of non-implementation
(Article 22.6 of the DSU). The appointment of an arbitrator under Article
22 by the Director-General is an alternative to the original panelists
undertaking the task, if they are unavailable.

(iii) The Panel

Panels are established to examine a particular matter and are to be
comprised of "well-qualified" individuals with experience relating to the
GATT, the WTO or international trade law or policy. Governmental and
non-governmental individuals may serve as panelists. Panelists may not
be citizens of any of the parties to the dispute without the consent of the
parties.

Panels are the quasi-judicial bodies, in way tribunals, in charge of
adjudicating disputes between Members in the first instance. They are
normally composed of three, and exceptionally five, experts selected on an
ad hoc basis. This means that there is no permanent..., panel at the
(WTO); rather, a different panel is composed for each dispute, anyone
who is well-qualified and independent (Articles 8.1 and 8.2 of the DSU)
can serve as panelist. Article 8.1 of the DSU mentions as examples
persons who have served on or presented a case to a panel, served as a
representative of a Member or of a contracting party to GATT 1947 or as
a representative to the Council or Committee of any covered agreement or
its predecessor agreement, or who have worked in the Secretariat, taught or published on international trade Law or policy, or served as a senior trade official or a Member. The WTO Secretariat maintains, indicative list of names of governmental and non-governmental persons, from which panelists may be drawn (Article 8.4 of the DSU). WTO Members regularly propose names for inclusion in that list, and, in practice, the DSB always approves their inclusion without debate. It is not necessary to be on the list in order to be proposed as a potential panel member in a specific dispute. Although some individuals have served on more than one panel, most serve only on one panel. There is thus no institutional continuity of personnel between the different ad hoc panels. Whoever is appointed as a panelist serves independently and in an individual capacity, and not as a government representative or as a representative of any organization (Article 8.9 of the DSU).

The panel composed for a specific dispute must review the factual and legal aspects of the case and submit a report to the DSB in which it expresses its conclusions as to whether the claims of the complainant are well founded and the measures or actions being challenged are WTO-inconsistent. If the panel finds that the claims are indeed well founded and that there have been breaches by Member of WTO obligations, it makes a recommendation for implementation by the respondent (Articles 11 and 19 of the DSU).

(iv) Appellate Body

Unlike panels, the Appellate Body is a permanent body of seven members entrusted with the task of reviewing the legal aspects of the reports issued by panels. The Appellate Body is thus the
second and final stage in the adjudicatory part of the dispute settlement system. One important reason for the creation of the Appellate Body is the more automatic nature of the adoption of panel reports since the inception of the DSU. In the current dispute settlement system, individual Members of the WTO are no longer able to prevent the adoption of panel reports, unless they have at least the tacit approval of all the other Members represented in the DSB. The appellate review carried out by the Appellate Body now has the function of correcting possible legal errors committed by panels. In doing so, the Appellate Body also provides consistency of decisions, which is in line with the central goal of the dispute settlement system to provide security and predictability to the multilateral trading system ("Article 3.2 of the DSU). If a party files an appeal against a panel report, the Appellate Body reviews the challenged legal issues and may uphold, reverse or modify the panel's findings (Article 17.13 of the DSU).

Article 17 of DSB provides that a standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve-in rotation. Such rotation shall be determined in the working procedures of the Appellate Body (17.1). The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they
arise, a person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.

Either three or four Appellate Body members have always been citizens of a developing country Member. According to the Working Procedures for Appellate Review, the seven Appellate Body members elect one of their members as Chairman who serves a term of one or maximum two years. The Chairman is responsible for the overall direction of the Appellate Body business, especially with regard to its internal functioning.

In short Appellate Body has been set up, Comprising seven members with "demonstrated expertise" in law and international trade. The members broadly represent the geographical spread of WTO membership. They are appointed for four years, in each case with the possibility of one reappointment for a further four years. Three will be selected to serve on any one case. Once a panel has completed its work this Body may be requested by either party to a dispute to review questions of law, which are covered in a panel report and legal interpretations, developed by the panel. It does not reconsider the facts of a case. It too reports to the DSB.

(v) Arbitrators

Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that
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concern issues that are clearly defined by both parties. Article 25 of the DSU provides that except as otherwise provided in the Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards. Arbitration results are not appealable but can be enforced through the DSU.

(vi) Experts

Disputes-often involve complex factual questions of a technical or scientific nature, for instance when the existence or degree of a health risk related to a certain product is the subject of contention between the parties. Because panelists are experts in international trade but not necessarily in those scientific fields, the DSU gives panels the right to seek information and technical advice from experts. They may seek information from any relevant source, but before seeking information from any individual or body within the jurisdiction of a Member, the panel must inform that Member (Article 13.1 of the DSU). In addition to the general rule of Article 13 of the DSU, the following provisions in the covered agreements explicitly authorize or require panels to seek the
opinions of experts when they deal with questions falling under these agreements:

- Article 11.2 of the Agreement on Sanitary and Phytosanitary Measures;
- Articles 14.2, 14.3 and Annex 2 of the Agreement on Technical Barriers to Trade;
- Articles 4.5 and 243 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Panel may consult either individual experts or appoint an expert review group to prepare an advisory (Article 13.2 of the DSU). Rules for the establishment of expert review groups and their procedures are contained in Appendix 4 to the DSU. The final reports of expert review groups are issued to the parties to the dispute when submitted to the panel. Expert review groups only have an advisory role. The ultimate decision on the legal questions and the establishment of the facts on the basis of the expert opinions remain the domain of the panel. Participation in expert review groups is restricted to persons of professional standing and experience in the field in question.4

**WTO Dispute Settlement Procedure**

Settling disputes is the responsibility of the Dispute Settlement Body, which is the WTO General Council in another guise. The DSB has sole authority to establish "panels" of experts to consider the case,

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4 Ibid.
and to adopt the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations of panels and the Appellate Body, and has the power to authorize retaliation when a country does not comply with a ruling.

On of the most important changes introduced by the transition from GATT to the WTO in 1995 was the agreement to implement a dispute settlement process that would be speedier and more automatic”, with fixed deadlines. This Agreement is set out in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes namely the disputes settlement Understating” or the “DSU”. It is more automatic in the sense that the dispute settlement process, including the adoption of the final panel report and the authorization of sanctions in case of non-compliance, can only be blocked if there is a consensus to do so which referred to as “reversed consensus”. Previously, under the GATT, it took a consensus among all countries to adopt the report- hence the losing party to the dispute could always block an unfavourable ruling.

The Integrated WTO dispute settlement system
(Annex 2 to the 1994 Agreement Establishing the World Trade organization)

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The important innovation of quasi-automatic decision-making in the DSB, except in the case of a "negative consensus" on the establishment of panels (Article 6:1), the adoption of panel reports (Article 16:4), and appellate reports (Article 17:4) and on the granting of requests for suspension of concessions in case of non-implementation of dispute settlement rulings (Article 22:6) is supplemented by new procedures for an "interim review" of panel reports (Article 15) and their legal review by a standing appellate body (Article 17).

As the findings of the final report includes a discussion of the arguments made at the interim "review stage" the drafters hoped that the interim review would ensure the consideration of all relevant arguments in the final report, enhance the legal quality of the panel reasoning and, similar to the "appellate review", reduce the risks of unpredictable panel findings and their quasi-automatic adoption. The latter is regulated in Article 16:4^5 in the following terms;

Within 60 days after the date of circulation of a panel report to the members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If the party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their view on a panel report.

Both panel reports and appellate body reports are thus deemed to be adopted unless there is a "negative consensus" not to adopt these

^5 DSU (Annex-2 to the WTO Agreement 1994).
reports or the panel report is appealed. Since the complainant will not join such a negative consensus unless the dispute is settled in accordance with WTO law, this quasi-automatic adoption of the reports implies a significant "legalization" and in view of the independence of members of panels and appellate body, a "quasi-judicialization" of the dispute settlement process in the WTO.

The DSU provisions on mutually agreed arbitration "as an alternative means of dispute settlement" (Article 25), on compulsory arbitration on the "reasonable period of time" for the implementation of dispute settlement rulings (Article 21:3) and on disputes over the suspension of concessions (Article 22:6-6) reflect a further shift towards judicial methods of dispute settlement in the WTO. Moreover, the explicit right of third world WTO members and of the DSB to challenge bilaterally agreed dispute settlements and arbitration awards (Article 3:6) under lines the multilateral nature and legal primacy of the WTO Agreement vis-à-vis bilaterally agreed departures from WTO rules.6

Panel Procedure

Panels resemble arbitrary tribunals, the compositions of which is normally also under the control of the parties to the dispute. Only if the two sides cannot agree does the WTO director general appoint them. Panels consist of three (occasionally five) experts from different countries, who examine the evidence. Panelists for each case can be chosen from a permanent list of qualified candidates, or from elsewhere.

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They serve in their individual capacities. They cannot receive instructions from any government. Officially, panel and Appellate Body rulings and recommendations “help” the DSB to make its rulings or recommendations. However, because the reports of panels and the Appellate Body can only be rejected by consensus in the DSB, their conclusions are difficult to overturn. Panel and Appellate Body findings have to be based on the agreements cited and should normally be given to the parties to the dispute within nine months from the establishment of the panel.

In general, after two hearings with the parties and technical experts, if necessary the panel submits the descriptive sections of its report (facts and arguments) for comments to the parties. These do not include any conclusions or findings; the purpose at this stage is to ensure that there is no misunderstanding on the facts of the case. This is followed by an “interim report” also submitted to the parties for review, and then the report, which is first submitted to the parties and then later circulated to all WTO Members. Subsequently, the final report is passed to the DSB, which can only reject the report by consensus. The report becomes the DSB’s ruling or recommendation within 60 days and is posted on the WTO website.

Panel reports can be appealed. The Appellate Body can hear an appeal only on points of law decided by panels. Generally, the Appellate Body is not allowed to review facts of the case, as determined by the panel or examine any evidence. Each appeal is heard by three members

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7 If one party raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report. In all SPS cases, for example, expert advice was sought.
of a quasi-permanent seven-member Appellate Body set up by the DSB. Members of the Appellate Body have four-year terms and may be reappointed once. They have to be individuals with recognized standing in the field of law and international trade and not affiliated with any government. The Appellate Body can uphold, modify or reverse the panel’s legal findings and conclusions, and proceedings should normally not last more than 90 days. When a case has been appealed, the DSB has to adopt the reports of the Appellate Body and of the panel as amended, reversed or upheld within 30 days from the circulation of the Appellate Body report; rejection is only possible by consensus.

**Appellate review procedures**

The new WTO dispute settlements system provides for quasi-automatic adoption of panel reports by the DSB, without previously existing possibility of blocking consensus, as well as for strengthened procedures for the enforcement of adopted panel reports. This legalization was acceptable because the provisions on “interim review” by panel (Article 15), and on appellate review by a standing appellate body composed of seven independent experts appointed for a four year term (Article 17), offered additional safeguards against legally wrong panel reports.\(^8\)

The seven persons on the appellate body serve in rotation, and only three of them serve on any one case, as determined in the working procedures for the appellate body. The membership broadly represents the membership in the WTO, and all persons serving on the Appellate Body are required to be available at all times and on short notice

\(^8\) Ibid.
(Article 17:3). Only parties to the dispute formally notifies its decision to appeal to the date the appellate body circulates its report. Unless otherwise agreed to by the parties to the dispute, the overall “period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed” (Article.20)

In February 1996, the Appellate body adopted its working Procedures for appellate Review in consultation with the chairman of the DSB and the WTO Director-General.

In the letter, with which the appellate body conveyed it’s Working Procedures for Review to the DSB for information, the appellate body drew attention in Particular to those parts of the Working Procedures to bear on the “collegiality principle” and the composition of division of three appellate body members. The letter emphasizes that, in accordance with Article 17:1 of the DSU, the decision in every appeal will be made only by the three members who serve on the division for that case.

As the provisions on appellate review in Article. 17 of the DSU do not provide for a procedure to ensure the overall consistency of the decisions by the several divisions of the appellate body, the “collegiality principle” fills a major gap through a “creative interpretation” of Article. 17. The same is rue for the constitution of “divisions” of Article.17 of the DSU; Rule 6 of the Working Procedures for appellate Review envisages in this respect a rotation “taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their origin.
Surveillance of implementation of rulings and recommendations

Article 21:3 specifies alternative procedures for determining, by agreement or "through binding arbitration within 90 days after the date of adoption of the recommendations and rulings", "the reasonable period of time" which, in general, should not exceed 15 months from the date of adoption of a Panel or appellate body report. Subject to certain expectation, the period from the date of establishment of panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise (Article 21:4).

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resorting to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it (Article 21:5). The DSB shall keep under regular surveillance the implementation of adopted ruling and recommendation, and the member concerned shall provide the DSB with a "status report in writing of its progress in the implementation of the recommendation or rulings (Article 21:3).

Yet, notwithstanding these strengthened disciplines, implementation of dispute settlement rulings will continue to be influenced by the relative economic and political weight of the parties to the dispute and by bilaterally negotiated dispute settlements.
Compensation and the Suspension of Concessions

Article 22:1 of the Dispute Settlement Understanding Codifies two principles of GATT dispute Settlement practice:

➢ Compensation and the 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.

➢ Compensation is Voluntary and, if granted, shall be consistent with the covered agreements.

Further, Article 22:2 introduces a new obligation to “enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation, if the member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to Article 21 and the complaining party requests such negotiations. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, “any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the covered agreements.”

Arbitration procedures

Article 25 on arbitration within the WTO as an alternative means of dispute settlement “largely confirms principles already agreed upon

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9 Understanding on Rules and Procedures Governing the Settlement of Disputes.
in the 1989 GATT Dispute Settlement Rules and procedures. Since bilateral arbitration has only rarely been resorted to in GATT practice, the Uruguay Round negotiations preferred to leave it to the parties to agree on the procedures to be followed rather than to prescribe detailed arbitration procedures. But Article. 25 limit the “party autonomy”, and integrate the resort to arbitration into the multilateral WTO dispute settlement system, by stipulating, inter alia, that:

- Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration proceedings subject to the agreement of the parties who have agreed to have recourse to arbitration.

- “Arbitration awards shall be notified to DSB and the council or committee of any relevant agreement where any member may raise any point relating thereto”. This provision was inserted so as to make clear that the arbitration award, even through it will be legally binding on the parties to the proceeding and may be enforced pursuant to Articles 21 and 22 of the DSU, can not affect rights and obligations of third WTO members or the power of DSB to interpret WTO rules in a different manner.

However, the DSU rules on intergovernmental arbitration as an alternative means of dispute settlement among WTO member governments are different from private arbitration and “independent review procedures”\textsuperscript{12}

\textsuperscript{11} Ct. E.U. Petersmann- Strengthening the GATT Dispute Settlement System on the use of Arbitration in GATT, pp. 323-343.

\textsuperscript{12} Ibid.
## Table: WTO DISPUTE SETTLEMENT PROCEDURE

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<td>If no compensation is agreed after expiry of “reasonable period to time”, DSB authorizes retaliation pending</td>
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* DSB acts as an impartial body to resolve disputes between WTO members.
Comparison Between Dispute Settlement System of GATT and the WTO

The WTO has introduced a more legalistic approach to trade dispute settlement than its predecessor GATT, because of the absence of a proper machinery for dispute settlement, disputes took long to clear. This also meant that GATT required more diplomacy than law to settle disputes. Under the GATT dispute settlement machinery, there resulted a lot of delay and often non-implementation of the agreements reached.\(^{13}\)

But, the WTO has changed all that. It has introduced a remarkably efficient and predictable legal system of dispute settlement with a built-in mechanism for sanctions and procedures for cross-sectoral retaliation. This is regarded generally as one of the more positive aspects of the WTO system. Disputes can, in theory, be brought to WTO panels for speedy dispensation of settlement.

Disputes under GATT 1947 system necessitated the panel preferring one party's interpretation of the WTO agreement over the others. At the same time, a long party could block decisions because consensus was required for adoption. This led to a disproportionate number of decisions that were never adopted. Lacking a consensus, the legality or enforceability of a decision was questionable at best.\(^{14}\)

Instead of writing reports that are designed to achieve a consensus among WTO members Panels are now liberated from the need to satisfy

\(^{13}\) "WTO's dispute settlement system and the proposed Centre on WTO Law-SEATINI Bulletin (Vol.2. No.7)

all parties and can concentrate on the merits of the dispute and the unencumbered application of the facts to the WTO law. This change is attributable to the negative consensus rule under the Dispute Settlement Understanding where Panel and Appellate Body reports are automatically binding, subject to a negative Vote by the parties in the Dispute Settlement Body. By automatic adoption, the party has substituted legal legitimacy for political legitimacy in the dispute settlement process.

> Panels under GATT 1947 were established on an ad hoc basis, independent of any other Panels or disputes between contracting parties, there were no specific clauses under GATT 1947 providing for the establishment of dispute resolution Panels, although they were loosely authorized under Articles XXII and XXIII, which stipulated that the parties were to consult.\(^{15}\) Dispute resolution evolved under GATT as a practical way to administer disputes as opposed to parties engaging in consultations.

Alternatively, the WTO Dispute settlement system adopts a more permanent presence, lending new Status to the Dispute Settlement Body (DSB). Its raison d'être is to specifically deal with trade disputes and elucidate the mutual obligations of members.\(^{16}\)

> Unlike previous GATT Panels, the dispute settlement bodies under the WTO are explicitly required to invoke the rules of

\(^{15}\) Eventually, GATT 1947 contracting parties adopted certain procedural rules and understandings that general dispute settlement.

\(^{16}\) James, Cameron & Kr.R. Gray- 'Principles of International Law in the WTO Dispute Settlement Body'- I & CLQ (2001) 50 (2).
interpretation of treaties as a source to clarify WTO Agreements. Article 3:2 of the DSU states that WTO agreements are to be interpreted in accordance with the customary rules of interpretation of public international law.

From the inception of the WTO in January 1995, over 277 disputes had been initiated in the Dispute Settlement Body by the end of 2002. This poses a marked contrast with the number of disputes heard under the GATT 1947 system. Hence confidence in the DSB is probably the WTO’s greatest success. The creation of an Appellate Body has contributed to a further sophistication of International trade law. The international dispute settlement system has never seen such a high Volume of cases.

**Public International Law and the WTO Dispute Settlement System**

The WTO has entered in a new era in decision making between the parties and in the resolution of disputes. Under the Dispute settlement Understanding (DSU). A Dispute Settlement Body consisting of dispute panels and an Appellate Body now adjudicates trade disputes between the parties. A WTO member may invoke the compulsory jurisdiction of the dispute settlement body by requesting the establishment of a panel to settle a dispute. There is then a right to appeal the panel’s decision. Cases which go to the appellate body involve legal questions arising out of the WTO agreement, and some raise important international law issues.
In fact, the global acceptance of a compulsory dispute settlement system as part of the WTO agreements lends credence to developments in international trade law and elevates the importance of public international law generally. The DSU furthers the role of legal adjudication in international trade law by creating a permanent appellate tribunal. This reflects the need to create a neutral arbiter of trade disputes, primarily based on legal interpretation of the WTO Agreements.

The WTO case law covers not only matters of interpretation and the function of the Dispute Settlement Body (DSB), but also includes aspects of customary international law, as well as general legal principles. Issues such as the burden of proof and judicial economy as well as the procedural fairness, have entered the discourse, enabling the DSB to develop a body of law, rather than simply act as an ad hoc arbitrator interpreting WTO law consistently with international law and other general legal principles.\textsuperscript{17}

This section examines how Dispute Settlement Body decisions have made the use of the general jurisprudence of international law, how far the Vienna Convention on law of Treaties, 1969 is applicable to WTO agreements and what is the role of different legal principles in the operation of dispute settlement process of the WTO.

\textsuperscript{17} E.U. Petersmann the GATT/WTO Dispute Settlement system (Kluwer Law Internatina., London : 1997) at 17.
Vienna Convention on Law of Treaties, 1969 and the WTO Dispute Settlement System

There was a lot of uncertainty with regard to the application of Vienna Convention on Law of Treaties, 1969 in case of GATT whose character as a binding treaty was doubted by some experts.\(^\text{18}\)

By contrast, the WTO agreements are treated as any other treaties in international law, having major implications in determining its relationship with other international agreements and international law in general.

Unlike previous GATT Panels, dispute Settlement bodies under the WTO are explicitly required to invoke the rules of interpretation of treaties as a source to clarify WTO Agreements. Article 3:2 of the DSU states that WTO agreements are to be interpreted in accordance with the customary rules of interpretation of public international law.\(^\text{19}\)

What constitutes customary international law in the interpretation of treaties is generally taken to be expressed in Articles 31 and 32 of the Vienna Convention on Law of Treaties. The Appellate Body noted that there was a need to achieve classification of the WTO agreements by reference to the fundamental rule of treaty interpretation in Article 31(1) of the Vienna Convention on Law of Treaties.\(^\text{20}\) The Universal

\(^{18}\) P. Nicholas, “GATT Doctrine” (1996), 2 Virginia J.g. Int law at 422.
\(^{19}\) This interpretative requirement extends beyond GATT 1994 and includes other agreements such as TRIPS (India-Patent Protection for Pharmaceutical and Agricultural Chemical Products WT/DS 53/AV/R, Dec. 1997) and the Agreement on Textiles and clothing (US-Restrictions on Imports of cotton and Man-Made Fibre Underwear (Adopted on 25 Feb. 1997) Japan-Taxes at section D. This was a reaffirmation of what was stated in US-standards for Reformulated and conventional Gasoline (1996) WT/DS2/AB/R.
application of the Vienna Convention of Law of Treaties to international trade law is Problematic, as some WTO members, including the US, are not parties to the Vienna Convention on Law of Treaties, 1969.


In this matter, both Venezuela and Brazil brought a complaint based on the effects of rules prescribed under the US Clean Air Act to foreign exported gasoline. Before the Panel, the US attempted to justify its measure under Article xx of GATT 1994, because it related to consuming natural resources pursuant to Article xx (g). The Panel was criticized by the Appellate Body for not giving full effect to Article 31 of the Vienna Convention in interpreting the crucial phrase in Article xx(g) of GATT, 1994, whether the rule constituted a measure "relating to the conservation of exhaustible natural resources". Relying on GATT 1947 jurisprudence, the Panel interpreted the term "relating to" as "primarily aimed at".21 The Appellate Body disagreed with the Panel's finding that the calculation of baseline levels of clean gasoline qualities, applicable to foreign producers, could be isolated from the overall policy objective of the legislation, so that the measure was not, on its own, "primarily aimed at" conservation. It was erroneous to conclude that baseline rules, in the context of lawmakers' intention, were not measures "relating to" the conservation of an exhaustible natural resource.

Under Article 31(1) of the Vienna Convention on Law of Treaties, a treaty is to be interpreted in good faith in accordance with the

21 This meaning was imported from Herring dispute.
ordinary meaning given to the terms of the treaty in their context and in
the light of the treaty’s object and purpose. A tribunal begins with the
words as agreed and looks for meaning there. Particular attention is paid
to the context of the treaty since a provision should not be interpreted in
isolation but in this context, in that part of the agreement and then in
relation to the entire agreement. Article 31(2) of the Vienna Convention
on Law of Treaties 1969 (VCLT) expressly defines the context of the
treaty as including the text. In the Underwear panel decision, the entire
text of the Agreement on Textiles and Clothing (ATC)\textsuperscript{22} was deemed
relevant in order to interpret Article 63.2 and 6.4 of the ATC. The
Cross-reference and interrelationship between all of the WTO
Agreements Opens up the possibility of considering them when
interpreting a particular agreement.

Article 32 of the VCLT codifies another fundamental rule of
treaty interpretation applicable to WTO Agreements. In fact, Article 32
of the VCLT is to be resorted to only when Article 31 fails to resolve a
problem of interpretation.\textsuperscript{23} Article 32 was applied in the European
Communities Banana Case in order to confirm the Panel’s conclusions
flowing from the application of Article 31. The Ordinary meaning of the
word “affecting” in the General Agreement on Trade and
Services (GATTS) was employed by applying the test in Article 31 of
the VCLT, but the Appellate Body still looked at the preparatory work
of the treaty to confirm this interpretation.

\textsuperscript{22} WT/DS 33/2

\textsuperscript{23} Article-32 of VCLT states that the secondary sources of treaty interpretation are
to be referred to only for confirming the treaty meaning after applying Article 31 or
determining the meaning when, after applying Art. 31, the interpretation leaves the
treaty’s meaning ambiguous or obscure or leads to a result which is manifestly
absurd or unreasonable.
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In fact, the link between Articles 31 and 32 of the VCLT and the interpretation requirements stated in Article 3:2 of the DSU is now entrenched in WTO law. This connection has emerged into a legal test from which Panels cannot deviate when reviewing provisions in the WTO Agreements. Failing to apply this test or using alternative methods of treaty interpretation can result in overturned rulings.\(^{24}\) In the Shrimp Turtle disputes, the panel was criticized by the Appellate Body for not following all the steps in applying the customary rules of interpretation of Public international law.\(^{25}\)

Moreover, the rules of treaty interpretation under international law are not limited to what is expressed in VCLT. The principle of effectiveness (\textit{UT res magis valeat quam pereat}) is a fundamental tenet of treaty interpretation, flowing from the contextual analysis required under Article 31 of the VCLT. If a treaty is open to two interpretations with one of them disabling the treaty from having the appropriate effects, good faith, the objects and purpose of the treaty demand that the effective interpretation should be adopted.\(^{26}\)

The interrelationship of the WTO Agreements constitutes a comprehensive legal system governing international trade. A contextual analysis of a specific article mandates an understanding of how the agreements function together. Applying the principle of effectiveness challenges the notion of lex specialis, where each agreement would

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\(^{24}\) The Panel in LAN Computers dispute was overruled by the Appellate Body, for its failure to examine the context of a tariff schedule or the object and purpose of the WTO Agreement and the GATT 1994, before resorting to an examination of the legitimate expectations of the parties.


operate in isolation from each other. The Panel in the Canadian Periodicals endorsed this approach, ruling that the ordinary meaning of the texts of GATT 1994 and GATS as well as Article 11:2 of the WTO Agreement, taken together, indicate that Obligations under GATT 1994 and GATS Co-exist and that one does not override the other. The finding was consistent with the rulings by the panel and the Appellate Body in EC Bananas where in accordance with Article 31 and 32 of the VCLT, the GATS was not limited to measures that directly govern or affect the supply of the service.

It, therefore, becomes evident that reading agreements together is the preferred approach by the Appellate Body. It is so because there are potential conflicts between the provisions of the various agreements.

In, Guatemala-Anti Dumping the appellants argued that the dispute settlement provisions under the Anti-Dumping Agreement took precedence over the general dispute settlement rules in the DSU. The Appellate Body noted that although the former provides for special rules and procedures, they only prevail over the DSU where there is a divergence between the provisions. It is only in situation of a conflict where adherence to the one provision would prevail. Where there is no

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27 Section V,C (i), para 5.17. This was confirmed by the Appellate Body in other disputes : Japan-Alcoholic Beberages, p.12: Measures Affecting the Importation of Milk and Exportation of Dairy Products. WT/DS103/AB/R, WT/DS113/AB/R.
28 European communities-Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/R.
29 Guatemala-Anti Dumping Investigation Regarding Portland Cement from Mexico (WT/DS60/AB/R).
30 Ibid.
difference, the rules of the procedures of the DSU apply together with
the special provisions of the covered agreement.\textsuperscript{31}

It is now very clear that the need for flexibility in interpreting
WTO Agreements has been recognized by the ruling of Panel and
Appellate Body. The Appellate Body in the Japan-Taxes case
appreciated the need for having definitive interpretations of GATT
1994. WTO rules were needed to be reliable, comprehensible and
enforceable. However, the Appellate Body added that interpretation is
not to be so rigid or inflexible as not to leave room for reasoned
judgments in confronting the endless and ever changing flow of real
facts in the real cases in the real world.\textsuperscript{32}

\textbf{Legal Principles Vis-à-vis Dispute Settlement: Doctrine of \textit{Stare
Decisis} and its applicability}

The doctrine of stare deci\hspace{0.17em}s has established its authority in
municipal legal systems operating in different parts of the world. But the
question of its applicability in international sphere in general, and in the
WTO dispute settlement mechanism in particular, is still uncertain and
controversial.\textsuperscript{33}

In fact, in the functioning of the International Court of Justice, the
doctrine of stare deci\hspace{0.17em}s has no application. Article 59 of the statute of
the International Court of Justice expressly states that “the decision of

\textsuperscript{31} A difference was found by the Appellate Body in Brazil-Export Financing
Programme for Aircraft (WT/DS46/AB/R) para 132, with respect to the provisions
governing the implementation of the recommendations and rulings of the DSB in a
dispute pursuant to Article 4 of the SCM Agreement.
\textsuperscript{32} Japan-Taxes, Section G.H. (1)(2)(c).
\textsuperscript{33} \textit{"Principles of International Law in the WTO Dispute Settlement Body"}- James
the court has no binding force except between the parties and in respect of that particular case".  

The role of GATT Panel decisions in interpreting the WTO agreements received some attention by the Appellate Body in Japan-Taxes dispute. It interpreted Article XVI: 1 of the WTO Agreement and paragraph 1 (b)(iv) of Annex 1a incorporating GATT 1994 into the WTO Agreement, as bringing the legal history and experience under the GATT 1947 into the new realm of WTO, to ensure continuity and consistency in a smooth transition. The experience acquired by the parties to the GATT 1947 was deemed relevant to the experience of the new trading system under the WTO. Flowing from that experience are panel reports that became an important part of the GATT system, often considered by future panels.

The Appellate Body refused to accord any binding effect to previous panel reports of GATT 1947. Panel reports required an adoption by the contracting parties in order to have any effect. Lack of adoption under the GATT 1947 regime can lessen the weight given to a panel’s decision. Where the decision to adopt a panel report is made, it still does not constitute an agreement by contracting parties on the legal reasoning contained in the Panel report. The decision to adopt a report by the parties did not constitute a definitive interpretation of the relevant provisions of GATT 1947 for the future. Under the WTO system, exclusive authority in interpreting GATT 1994 is conferred on the

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34 Statute of International Court of Justice. UNDPI 511 page 99.
35 Section E, page 12.
36 Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the contracting parties to GATT 1947 and the bodies established in the Framework of GATT 1947.
Ministerial conference and the General Council that have the sole power to adopt interpretations, with decisions taken by a three-quarters majority of the members.\textsuperscript{37} The DSB can issue recommendations and adopt rulings but they are prohibited from adding or diminishing the parties' rights and obligations. This effectively pre-empts the incorporation of other interpretations into the WTO Agreements. By deferring to the legislative branch of WTO, the Appellate Body in Japan-Taxes limited the role of DSB to clarifying, and not making WTO law.\textsuperscript{38}

In fact, the Appellate Body in Japan-Taxes concluded that Panel decisions were not binding, except with respect to resolving the particular dispute between the parties to that dispute.\textsuperscript{39} Panels are not bound by the details and legal reasoning of prior Panel reports, since there are other factors to consider including other GATT practices and the particular circumstances of the complaint. Decisions are deemed to be isolated acts that are generally not sufficient to established subsequent practice, since they do not form a sequence of acts establishing an agreement of the parties.\textsuperscript{40}

However, there are prominent experts like E.U. Petersmann and Professor John Jackson who are Critical of the Appellate Body's reasoning and approach as mentioned in the above paragraph. E.U. Petersmann challenges the Appellate Body's approach on the ground

\textsuperscript{37} Article IX:2 of the WTO Agreement. Articles 3(2) of the DSU and 19:2 of the WTO Agreement.
\textsuperscript{39} In Canada-Import Restrictions on Ice Cream and Yogurt, (1985) the panel held that prior panel reports can be relevant but not disparities; BISM 68 at 85.
\textsuperscript{40} Japan-Taxes at Section E, p.13.
that it “neglects the contextual difference between a judgment by the International Court of Justice (ICJ) and a GATT Panel report, whose subsequent deliberation and adoption by both the GATT council and the annual conference of the GATT contracting parties could make such reports more than an isolated act.” Professor John Jackson Criticises the Appellate Body’s ruling in Japan-Taxes where it compared DSB with the International Court of Justice. Whereas the ICJ is governed explicitly by Article 59 of the Statute of the International Court of Justice, which dismisses any stare decisis in the ICJ jurisprudence. Professor Jackson says that the approach adopted by Appellate Body is not well-founded.

In the new era of dispute settlement it appears that the development of case law under the WTO Dispute settlement Body may provide guidance for subsequent decisions. Panel and Appellate Body decisions have applied legal tests established in earlier decisons. In fact, in Canadian-Periodicals, the Appellate Body upheld the test for determining like products under Article III:2 of the GATT 1994 that was devised by the Appellate Body in Japan-Taxes. As the number of Panel decisions increase, there will be a growing reliance on them to substantiate a party’s position.

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43 UNDPI/511; p.99
44 It is generally considered that the previous decisions by International tribunals lack formal presidential effect: I Brownlie, Principles of Public International Law at 21 (5th ed), (New York: Clarendon Press; 1998).
45 Section G, p.17. The Appellate Body also applied the test in Japan Taxes for determining whether a product is “directly competitive or substitutable” under the second sentence of Art.III:2 Section H, p.18.
Although panel decisions have been ruled as not forming a proper source of interpreting the WTO Agreements and the Appellate Body has reinforced the case-by-case approach to resolving disputes, there is an inevitable trend that future Panels may be influenced by previous decisions. The reasoning of the Panels can provide useful guidance for future decisions, even to the point of being persuasive in a more formal sense. This is a concept familiar to common law lawyers.\(^{46}\)

However, the legal conclusions found in an unadopted Panel report can not be relied upon. In Argentina-Measures Affecting Imports of Footwear Textiles, Apparel and other items,\(^{47}\) the panel considered the reasoning of the Panel in the Bananas II panel report,\(^{48}\) which was unadopted, to be relevant and useful to the dispute. The Appellate Body clarified in distinction between deriving useful guidance from an unadopted report and relying upon it.\(^{49}\)

**Burden of Proof in Dispute Settlement proceedings**

The burden of proof is an evidentiary rule, fundamental to all legal systems. In WTO law, the burden is normally allocated to the complainant to establish that a violation of GATT 1994, as well as other WTO agreements, has occurred. The Burden of proof, in fact, rests with the party (whether complainant or defendant), which asserts the affirmative of a particular, claim or defence.

\(^{46}\) Desiccated Coconut, panel Report (WT/DS 22/R) at Section VI, A, I (b) (iii) para, 258.
\(^{47}\) WT/DS56/R.
\(^{48}\) DS 38/R, 11 Feb. 1994 (This was a pr-WTO Panel report dealing with the bananas import dispute over the E.U. regime).
\(^{49}\) DS 56/AB/R a Section IVA, para 44.
In *Shirts and Blouses* dispute, the Panel found that the burden of proof rested with India to prove that there was a violation of the ATC due to the U.S. safeguard measure. It was for India to advance factual and legal arguments in order to establish that the import restriction was inconsistent with Article 2 of the ATC and that the U.S. determination of serious damage or actual threat, pursuant to Article 6 of the ATC, was not evident.\(^50\)

When the dispute reached before the Appellate Body, it discussed the burden of proof in the context of international law. In rejecting India’s contentions that the burden of proof was initially on the U.S., the Appellate Body questioned how any system of judicial settlement could function where a mere assertion of the claim amounts to proof.

In the Beef Hormones Case, the initial burden of proof under SPS Agreement was ruled to lie with the complaining party, who is required to establish a prima facie case of inconsistency with a particular provision of the agreement. Once this is done, the burden of proof would move to the defending party who must refute the inconsistency.

In fact, the burden of proof serves as a benchmark for any effective dispute resolution system. It maintains fairness and order by presuming that WTO members are in compliance with their obligations until proven otherwise. A dispute mechanism operating under such a principle assures members that the benefits accruing directly or indirectly to them under the GATT 1994 will be protected. If a member

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feels that its benefits are nullified or impaired, dispute settlement is available.51

The burden of proving a violation is not insurmountably onerous. In international disputes, tribunals are normally given considerable flexibility in evaluating claims before it. A common problem is that a party cannot obtain access to specific evidence to prove a prima facie violation.52

Where a non-violation complaint is asserted, the rule on the burden of proof is modified. Non-violation complaints place the onus on the claimant to provide a detailed justification of its claim.53 This is a practice in the WTO recognized in the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Article 26(1)(a) of the DSU deals with non-violation claims, providing that the claiming party must present a detailed justification to support their claim.

A prima facie case is established if in the absence of effective refutation by the defending party a panel is required as a matter of law to rule in favour of prima facie case. Once the prima facie case is sufficiently demonstrated, the burden shifts to the other party to adduce evidence to rebut the presumption. Where a party attempts to invoke an exception under the GATT 1994 or other WTO Agreements, the burden

51 Article XXIII(a) allows a party to bring forward a complaint when any provision of the WTO Agreements is violated.
52 Due to differing institutional capacities of WTO members, this problem is more acute in developing and transitional countries.
53 U.S.-Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1995 Waiver and Under the Head note to Schedule of Tariff concessions (1990); BISD 228.
is shifted to that party. If the respondent party justifies its actions under an exemption, there is a burden on it to demonstrate that its measures are consistent with that exception. use of countervailing duties, is an exception placing the burden of proof on the complaining party.

Judicial Economy

It is succinctly defined as an attempt to settle as many issues as possible in a single proceeding. The practice of joining disputes is codified under Article 9(1) of the Dispute Settlement Understanding, which gives a panel full discretion to do this when it is requested by more than one WTO members.

In fact, the concept of judicial independence or economy as evolved in the WTO jurisprudence is to outline the Panel’s freedom to determine what issues it will respond to. The need for judicial economy is greater under the WTO. The basic reason, indeed, is that each particular argument advanced by the parties is much broader in scope. Responding to all of them undermines the effectiveness of the DSB to respond expeditiously to complaints made by the parties.

Early DSB practice demonstrated in the Reformulated Gasoline and Japan-Taxas cases revealed that a response would be on every issue

54 In Shirts and Blouses dispute, India was required to put forward evidence and legal arguments sufficient to demonstrate that the safeguards by U.S. was inconsistent with obligations assumed by the U.S. under Articles 2 & 6 of ATC. The anus then shifted to U.S. to bring forward evidence and disprove the claim.
55 Canada- Administration of the Foreign Investment Review Act, BISD 305/140.
57 Annex 2 to the WTO Agreement-Understanding on Rules and Procedures Governing the Settlement of Disputes.
that was pleaded. The Appellate Body in Shirts and Blouses ruled that nothing in Article 11 of the DSU, or previous GATT practice, mandated an examination of all legal claims made by the complaining party.\textsuperscript{58} But it was also observed that Panels are required to address all of the parties argument but only those necessary to resolve a particular claim.\textsuperscript{59} The Appellate Body added that in reviewing recent practice of WTO Panel, Panels will make findings only on claims that were necessary to resolve the particular matter as long as they were stated in the terms of reference.\textsuperscript{60} This was in accordance with the basic aim of dispute settlement in the WTO, set out in Article 3.7 of the DSU, to secure a positive solution to a dispute.

\textbf{Application of Certain General Principles of International Law in Dispute Settlement}

\textit{(i) State Responsibility:} An indirect reference was made to the principle of state responsibility by the Appellate Body in Shrimp Turtle, where the U.S. was held to be responsible for acts of its departments and branches including its judiciary. The relevance of state responsibility is apparent when determining whether certain measures can be impugned as attributable to a member State. It was implicitly applied in a few GATT 1947 disputes.\textsuperscript{61}

\textsuperscript{58} J. Cameron & K.R. Gray- Principles of International Law in the WTO Dispute Settlement Body-I & CLQ. Vol 50 (Part.2) 2001 page 282.
\textsuperscript{59} Poultry, at Section VIII, para 135.
\textsuperscript{60} Ibid. 17 must noted that a partial resolution of a dispute, not responding to all the necessary claims, can create false judicial economy and therefore be in violation of Article 3:7 of the DSU- (Australia-Measures Affecting Importation of Salmon), WT/DS18/AB/R Wction IV, E-I para 223-224.
Another dimension of state responsibility is the relationship between domestic and international law. The Panel in Footwear dispute discussed the use of national law to excuse an international trade obligation. Argentina argued that they were not in violation of Article II since their legal system afforded an adequate judicial remedy to correct an apparent breach. The Argentine constitution provided that international law would take precedence over national legislation and all Argentine Judges were obligated to recognize the supremacy of WTO rules over inconsistent Argentine measures. The panel rejected this argument. Although Argentine Judges were required to recognize the supremacy of WTO rules over an inconsistent Argentine measure, a party can still be in violation regardless of any available judicial remedy.

Hence, a WTO member cannot assert that its internal system provides for a remedy to certain individuals, either national or foreign, so that it could never be in violation of a WTO agreement.

(ii) Estoppel: Another principle of International law considered by Panels is Estoppel. Originating in both Civil and common law, Estoppel prevents a state from denying a clear and unequivocal representation made with intention that it should be relied on. Estoppel is shown where the other party, relying on the representation, changes its position to its detriment or suffers some prejudice.\(^{62}\) It has been explicitly recognized in Trade disputes.

\(^{62}\) Claims based on acquiescence and estoppel were accepted in GATT 1947 arbitration award on Canada/EC Article XXVIII Rights (BATT BISD 375/80).
In the German Starch Case, Benelux Governments complained that Germany had not acted on its promise to reduce its tariffs immediately on varieties of starch. Germany’s promises were manifest in the form of general assurance made during the negotiations that their duties would be reduced as soon as possible and that Germany would commence negotiations of the tariffs in 1952. Detrimental reliance was evidenced by the Benelux governments’ unreciprocated tariffs concessions, given during the negotiations, which were based on the promise of future German tariffs reductions. The ruling was not determinative in the dispute as the Panel recommended that the parties find an acceptable resolution of the problem.

Therefore, in what can be considered as obiter dicta, the Panel noted that the subsequent agreement by Germany to grant tariff concessions implied that Germany would have been estopped from refusing to provide the expected tariff concessions.

Then there is ‘abus de droit’ doctrine (abuse of rights), which is rooted in the principles of good faith and equity. The basic purpose of this doctrine is to prohibit action which, while not contrary to the letter of law or agreement, deviates from their purpose and frustrates legitimate expectations relating to the exercise of the corresponding obligations.

The doctrine was applied in trade context in the Ammonium Sulphate Case. In this case, Chile and Australia negotiated for mutual

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63 (1950) BISD 35/77-German Import duties on Starch. EEC-Members Import Regimes for Banas, 1993.
64 A. Kiss, : L; Aus de Droit en Droit International", (1953), Recueil des courts.
65 The Australian Susidy on Ammonium Sulphate, 3 April, 195, BISD 11/188.
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tariff concessions on ammonium sulphate fertilizers. Australia discontinued its system of subsidies for Chilean fertilizers that was in place at the time of negotiations. Chile complained that its expected benefits under the GATT 1947 were impaired by the withdrawal. During negotiations, Chile’s concession was reasonably based on the assumption that the subsidies would continue as they had existed for years. Australia replied that it had no obligation under GATT 1947 to continue subsidizing foreign production.

The Panel conceded that the removal of a subsidy did not result in nullification or impairment of benefits. However, the situation at the time of negotiations was such that Chile relied on the subsidy of which the removal created an imbalance in trading relations. Chile was ruled to have a legitimate expectation of the subsidy not being revoked, basing their own concessions on the availability of the subsidy.

To conclude, it becomes crystal clear from the discussion in the preceding pages of this chapter that the development of WTO case law can be viewed as contributing to the larger evolution of international law. Its rulings develop international legal jurisprudence. At the institutional level, the global community becomes more secure with the knowledge that an international dispute resolution regime can function in a mutually satisfactory, principled and efficient way.

Developing Countries and Dispute Settlement under GATT 1947/WTO

Developing countries had relatively little recourse to GATT dispute settlement mechanism under GATT, 1947, that is, before the
inception of WTO. There may have been several reasons for this, but lack of trust in the system was by far the most important factor.

In the 1950s, developing countries such as Pakistan, Cuba, Chile, Haiti and India actively used the nascent GATT dispute settlement mechanism to pursue their national interest. However, developing countries gradually lost interest in the system because in the eyes of the developing countries, it largely failed to deliver the desired results. This was amply demonstrated by the 1961 Uruguayan complaint, when Uruguay filed a case under GATT Article XXIII against fifteen developed countries, listing 576-trade restrictive measures.

While the Uruguayan complaint may have been successful in highlighting what it considered to be commercial barriers, legal or otherwise, to developing countries exports, if failed to achieve any significant reduction in these barriers through its legal action. Robert Hudec concludes: “At the conclusion of the proceeding, Uruguay noted the removal of certain restrictions, but said that others have been added in the meanwhile and that consequently Uruguay’s overall position was no better than before. The lesson to be drawn from the case, according to Uruguay, was that GATT law did not protect developing countries.”

The developing countries had less recourse to the GATT dispute settlement system after this turn of event, yet they still tried to improve the system in their favour by introducing formal changes to it. In 1965,

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66 Uruguayan Recourse to Article XXIII, BISD 11 s/95.
Brazil and Uruguay tabled a proposal for amending Article XXIII of the GATT. Their proposal had the following four elements;

(i) the present arrangement for action under para 2 of Article XXIII should be elaborated in a way which would give developing countries invoking the Article option of employing certain additional measures;

(ii) Where it has been established that measures complained have adversely affected the trade and economic prospects of developing countries and it has not been possible to eliminate the measure or obtain adequate commercial remedy, compensation in the form of an indemnity of a financial character would be in order;

(iii) In cases where the import capacity of a developing country has been impaired by the maintenance of measures by a developed country contrary to the provisions of the GATT, the developing country concerned shall be automatically released from its obligations under the General Agreement towards the developed country complained of, pending examination of the mater in GATT; and

(iv) In the event that a recommendation by the contracting parties to a developed country is not carried out within a given time limit, the contracting parties shall consider what collective action they would take to obtain compliance with their recommendations.

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68 BISD 14$/139
The above mentioned proposal was not accepted by the contracting parties to GATT 1947. However, it led to a modest change in GATT dispute settlement procedure providing for a shorter time frame for complaints initiated by developing countries, known as the 1966 Decision, which is still in effect (DSU, Article 3.12), though rarely used. The developing countries remained disillusioned about the efficacy of the GATT dispute settlement mechanism.

Brazil made another attempt during the early phase of Uruguay Round dispute settlement negotiations when it put forward formal proposals to give more favourable treatment to developing countries, arguing that their limited power of retaliation, as well as Part IV of the GATT and earlier decisions in their favour, required that they be provided with a "higher level of equality". The rationale behind the new Brazilian proposal was the same as its 1965 proposal, and again it was not accepted.

In practice the WTO dispute settlement with its larger emphasis on "rule-oriented" mechanism has experienced two major problems during its actual operation from 1995 to January 2003. One is in relation to disputes between parties of equal or almost equal strength. The second is in relation to weaker or poorer members of the organization, especially the developing counties (DCs) and the economies in transitions (ETs).

Since the first problem is not relevant for the purpose of this chapter, only the second one is taken for some detailed discussion. For

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The developing countries, the WTO dispute settlement system has worsened matters for them. For following two reasons.\textsuperscript{70}

Firstly the DCs cannot afford the high cost of litigation. International law firms charge exorbitant amount per hour in fees for WTO cases. Few developing countries and economies in transition (ETs) can afford the fees. The result is that while there are potentially hundreds of cases that they could bring to the WTO on non-implementation by the developed countries of their obligations to the dispute settlement system of the WTO. Thus the rich get off the hook simply because the poor cannot afford the cost of litigations.

Secondly, the system has become more onerous and resulting in inequality for the weaker members of the WTO than under GATT is that they are now subject to a legalistic system to which they are a party and from which they cannot escape. Under GATT, they could escape sanctions because of the laxity of its system. But now they are bound by the decisions of the WTO dispute settlement panels. If the system is unfair to them, they have no “escape route” because they are the signatories of the Treaty. They have, therefore, become the authors of their own misery.

**Poor Country Access To WTO Litigation Services.**

The successful publication private partnership that has evolved in the developed country context to facilitate WTO litigation may not materialize in developing countries, suggesting a role for intervention. This presents a number of alternative approaches to improve developing

\textsuperscript{70} "WTO dispute settlement System and the proposed centre on the WTO law" (Director’s comment in SEATINI Bulletin. Vol2., No.7)
country access to legal services. The insights of the well-developed body of research on employment law—i.e. the evolution of centres and organizations designed to assist individuals to protect their interests against much stronger opponents which are typically corporations and are relevant to the WTO setting.\textsuperscript{71} There are also differences relating to the issues of organization, funding and sovereignty that have to be looked into for the WTO being a self-enforcing agreement. Thus there are limitations as to how far one can push the analogy.

**The Advisory Centre on WTO Law**

For the case of WTO trade litigation, a legal services centre for developing countries—the Advisory Centre on WTO Law (ACWL)—was established in Geneva in 2001. In addition to more general legal advice on WTO matters, it offers support to complainants, respondents and third parties in WTO dispute settlement proceedings at subsidized (below market) rates, provided the parties are developing countries, customs territories, or economies in transition.\textsuperscript{72} Funding for the ACWL is through a “co-operative” approach. Its membership with the exception of the Least Developed Countries (LDCs), contributes to an “endowment Fund.” Contributions for developing country members are made on a sliding scale based on country characteristic. High-income members of the ACWL—who do not have access to the legal services

\textsuperscript{71} Jolls (2005) provides an excellent survey of these organizations’ role in enforcing provisions of employment law.

\textsuperscript{72} As of November 2004, services provided by the Centre were available to 27 developing countries who had become Centre Members, in addition to another 41 WTO Members and countries in process of acceding to the WTO (but non-Members of the ACWL) designated by the United nations ad LDCs. All information on the ACWL was taken from its website, http://www.acwl.ch, last accessed on 20 April 2005. Jackson (2002) provides an initial description of the role the ACWL might play at its inception.
provided by the Centre-have made substantial contributions to the Endowment Fund.\textsuperscript{73}

With respect to fees for legal services, the ACWL provides a very transparent process to help developing country litigant’s budget for WTO dispute settlement proceedings. In addition to creating a sliding scale of hourly billing rates depending on the developing countries’ categories, the ACWL has also developed an expected time budget for the average number of billing hours it expects to have to spend to help adequately advise clients.

Finally, the ACWL also maintains a “Roster of External legal Counsel” of attorneys willing to provide services to LDCs and other ACWL Members if a conflict of interest arises so that ACWL cannot provide services through its own attorneys. As of April 2005, nine law firms and two individuals and registered to offer their services through the ACWL.\textsuperscript{74}

The ACWL may do much to offset the lack of legal assistance available to poor countries. Because it is not funded by any interest groups it is not otherwise expected to develop an issues-oriented agenda and seek notoriety by trying to influence the composition of cases that come across its doorstep. This is an important and beneficial quality that will not necessarily be the case for some of the alternative models of subsidized provision of legal services to poor countries.

\textsuperscript{73} Developed countries that have each contributed $1 million or more to the Endowment Fund include Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden and the United Kingdom.

An additional problem is that the ACWL does not appeal to currently staff any professional economists, and thus cannot provide technical economic consulting services as litigation support. This is of substantial concern. Much of the actual litigation over trade matters at the WTO is likely to require a strong legal-economic partnership to put together a strong case. Economists can help clarify the consistency of an economic argument within legal briefs and assist in the establishment or rebuttal of economic augment within legal briefs and assist in the establishment or rebuttal of economic evidence.

The need to combine legal and economic expertise has been recognized. There are several priorities for capacity-building and technical assistance. First, developing countries need more access to information on the WTO- legality of the measures employed by their major trade partners. This information is vital not just in thinking about how to prosecute a case, but whether to prosecute a case. Institutions like the Agency for international Trade Information and Cooperation offer assistance to developing countries in interpreting trends in the global economy, and the Advisory Centre on WTO Law provides subsidized legal assistance. To close the early settlement gap, developing countries need to bridge the important contributions of these and other institutions, particularly with respect to evaluating the merits of a case before it is filed in Geneva, and articulating a negotiation strategy to win concessions before a legal verdict is issued. The long term goal, of course, is to build up this expertise in the capitals of developing countries, but in the short-term the focus might be on funding institutions like the Advisory Centre to increase staff and tackle this broader mandate, or develop others to fill this role.
Developing countries also require assistance monitoring compliance with the WTO verdicts they win. Both domestic and foreign trade associations and consumer groups can play a key role in this respect. Indeed, these organizations have strong incentive to keep track of protectionist practices on behalf of their constituents, and often have information that governments need to monitor compliance. The challenge for developing countries is not only to sponsor domestic trade associations and consumer groups but to forge contacts with foreign ones. Peru, for example, was assisted by a British consumer group in challenging Europe’s trade restrictions on sardines, an ally that will prove crucial in monitoring future compliance. Forging alliances with foreign trade associations and consumer groups is also a highly cost effective strategy for making better use of WTO dispute settlement, since resources are shared across a wide variety of organization with local expertise.

Wealthy countries should invest in capacity building and technical assistance for developing countries. It is their own best interest to do so if developing countries are less successful in WTO dispute settlement, this only incites cheating in the system more generally, which in turn hurts wealthier count, not just poorer ones. Lesser success in dispute settlement would also have a chilling effect on the willingness of developing countries to negotiate future trade rounds. Investing in capacity building and technical assistance should thus be a priority for the WTO membership as a whole, particularly as means to closing the early settlement gap.