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Chapter One

Introduction

Founded in January 1995, the World Trade Organization has become one of the key pillars of international trade, investment and development strategy. Furthermore, it is among most influential international organizations that exist today. However, the WTO organization took years of negotiations and numerous Ministerial Conference to complete the process of transformation from its predecessor the GATT to the position it has now. During the years, it developed strong institutional framework and complex law system. It can be said that the WTO through its functions and principles made a mechanism that enabled a fair trade on international level.

One can question in what way the WTO and developing countries are correlated. The WTO as an organization has always aspired to include all its Members, whether developed or developing countries, in negotiation that will lead to consensus-based decision that will improve international trade. The WTO did much to enable participation of developing countries in the WTO system.

In spite of problems developing country Members had in implantation of the WTO Arrangements, they obtained great benefit through trade liberalization. What is more, the special and differential treatment provisions are provided for developing countries in order for better integration in international trade.

Although developing countries are far more active in the WTO system than in the trading system of GATT, there is a good reason for it. The major one is that some developing country through years obtained great influence in trade and became economical power house. The second one is that with the great experience in negotiation in the old GATT system, developing countries began to connect amongst themselves more effectively and advocate their interests in a far more efficient manner.

The question of developing countries in international trade was pending since Uruguay Round but reached its pinnacle at the Doha Round.

The Doha Round is the first round of MTNs under the aegis of the WTO. It is also considered a central pillar of the global strategy to achieve the Millennium Development Goals, which in turn is a strategy chalked out by the United Nations to reduce poverty by giving poor people the opportunity to help themselves. The Doha Development Agenda (DDA) is a major opportunity to attack poverty in developing countries. It favors lifting the protectionist measures that have locked small and low income developing economies out of rich-country export markets.[1]

The Doha Development Agenda (DDA) is a project that intended to bring prosperity to developing countries and what is more to fight poverty on international stage. However, it had many setbacks at Ministerial Conference in Cancun. Nevertheless, the issues that Doha Round initiated brought many benefits to developing countries.

During the years the WTO through its case practice clarified its rules and solidified the way for international trade. What is more, its measures on Anti-Damping, Safeguards, Imposition of Countervailing Duties or Export restrain with great knowledge and consistency of the Panel and the Appellate Body established the WTO Legal system.

[1] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005)

Although there are numerous cases which are of paramount importance, in this study there are two that I found relevant in the context in which developing countries are trying to accomplish their rights against developed countries. These cases brought new perspective to the WTO legislation and in a certain manner empowered developing countries to seek their rights.

Through these examples it will be shown how the Panel and the Appellate Body made decisions in:

1)The US – Shrimp (Article 21.5 DSU)

2) European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries

As far as Dispute Settlement system is concerned, it has evolved from the old GATT system. The WTO changed inefficient GATT Dispute Settlement with a new set of rules. Understanding on Rules and Procedures Governing the Settlement of Disputes or Dispute Settlement Understanding (DSU) is a part of the WTO Agreement. With this new regulation Dispute Settlement became a milestone for stability in international economy. Its unique system guarantees that Members cannot avoid fulfillment of obligations and that their rights will be respected.

The Dispute Settlement Body as an alter ego of General Council has many obligations. With its broad authority to administer rules it is the base of Dispute Settlement mechanism. The Panel and Appellate Body procedures are strictly determined by the DSU.

However, DSU provides provisions that are at direct benefits for developing countries. Some of the benefits are: the choice of panelist developing countries can opt for at least one panelist that came from a developing country, relaxed deadlines, formal complaints against least developed countries are discouraged. The WTO had in mind that developing countries do not have the same resources as developed Members and tried to give them equal chance.

Effects of Economic Globalization

We live in a new world where everything is interconnected. Many of the world leaders have this in mind and support, or are unsupportive of the idea of the economic globalization. Regardless of this, economic globalization is here and is probably here to stay. This is a phenomenon which incorporates foreign trade and foreign markets. 'Economic globalisation' has been a popular buzzword for more than a decade now. Politicians, government officials, businesspeople, trade unionists, environmentalists, church leaders, public health experts, third-world activists, economists and lawyers all speak of 'economic globalisation'. The concepts of 'globalisation', and 'economic globalisation' in particular, have been used by many to describe the defining feature of the post-Cold War world in which we live. But what do these terms mean? Joseph Stiglitz, former Chief Economist of the World Bank and winner of the Nobel Prize for Economics in 2001, described the concept of globalisation, in his 2002 book, Globalization and Its Discontents, as:

The closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders.[2]

Economic globalisation is a multifaceted phenomenon, which undoubtedly is not yet fully understood. In essence, however, economic globalisation is the gradual integration of national economies into one borderless global economy. It encompasses both (free) international trade and (unrestricted) foreign direct investment. Economic globalisation affects people everywhere and in many aspects of their daily lives. It affects their jobs, their food, their health, their education and their leisure time. It affects the price people pay for gasoline, bananas and cars, and the health services accessible to them.[3]

This is something that has already been tried. The idea of free distribution and trade has existed for over 100 years. Even in the old days there were people who thought that free trade will help with jobs, education and health. While economic globalisation is often presented as a new phenomenon, it deserves to be mentioned that today's global economic integration is not unprecedented. During the fifty years before the First World War, there were also large cross–border flows of goods and capital and, more than now, of people. In that period, globalisation was driven by the lowering of trade barriers and by significant resulting reduction in transport cost from technological innovation such as railways and steamships. It is commonly argued that economic globalisation has been driven by two main forces. The first, technology, makes globalisation feasible; the second, the liberalisation of trade and foreign direct investment, makes it happen. Due to technological innovations resulting in a dramatic fall in transport, communication and computing costs, the natural barriers of time and space that separate national markets have been coming down.[4]

New technologies made the differences in distance irrelevant. Many services could be obtained way cheaper in markets where the cost of labor is numerous times lower than in the countries of origin. This trend has enabled the developing countries to join the world economy and develop as well.As a result of cheap and efficient communication, companies can locate different parts of their production process in different parts of the world while remaining in close contact. Activities such as writing software or accounting can be carried out anywhere in the world, far away from the customer or consumer.[5]

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[2] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 3

[3] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 4

[4] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 4

[5] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 5

New technological developments are likely to further accelerate the process of economic globalisation. The second driving force of economic globalisation has been the liberalisation of international trade and foreign direct investment. Over the last fifty years, most developed countries have gradually but significantly lowered barriers to foreign trade and allowed free movement of capital. In recent years, the liberalisation of trade and investment has become a worldwide trend, including in developing countries, although liberalisation still proceeds at different speeds in different parts of the world.[6]

Many people claim that although the world is heading towards becoming a global network, this is a process which can go back into its original state. Despite the fact that it has been claimed otherwise, nowadays there are factors that can defend this idea.While some politicians and opinion-makers claim otherwise, the process of economic globalisation is not irreversible. History shows that – for better or for worse – most man-made changes in society are irreversible. However, it would be very difficult, and foolhardy, for governments to reverse the current globalisation process.[7]

Furthermore, there are three strong points why this process of returning to the previous state would be extremely expensive and not practical to do. First, new technology has created distribution channels, especially for services, such as satellite communication and the Internet, that governments, with protectionist intentions, will find very difficult to control. Secondly, liberal international trade policies now have a firm institutional basis in the multilateral trading system of the WTO. Thirdly, the price to be paid, in terms of economic prosperity, for withdrawing from the global economy would be very high. Autarkies, such as North Korea, do not flourish in today's world.[8]

What is more, figures show that during the last fifty years export has expanded dramatically, whilst the developing countries also participated in the world trade more than earlier. In 1948, world exports of goods amounted to US$58 billion per year. By 2003, world exports of goods had increased toUS$7,294 billion, or more than US$7.3 trillion, per year. This represents an increase in international trade of more than 12,500 percent. World exports of commercial services, marginal in 1948, amounted in 2002 to US$1,540 billion. The ratio of global trade in goods and commercial services to world gross domestic product(GDP) is a reliable and much-used measurement of economic globalisation. In 1950, exports of goods and commercial services represented 8 per cent of GDP; in 2002, these exports represented 29 per cent, 0.2 per cent down from 2000, the top year thus far. Between 1990 and 2000, the ratio increased from 19.8 per cent to 29.2 per cent.[9]

The world has also experienced significant changes in terms of numbers regarding import and export. One of the most significant changes that can be observed is definitely the increase in the export of developing countries. Developing countries have registered particularly rapid increases in their ratios of exports to GDP. Exports now account for more than one-quarter of their combined GDP, a proportion which is higher than that of developed countries. Also, the composition of exports from developing countries has changed in recent years. While many developing countries remain dependent on primary commodities, the share of manufactured goods has been growing. Since the early 1990s, there has been a boom in high-technology exports, with countries such as China, India and Mexico emerging as major suppliers of cutting-edge technologies, as well as labour-intensive goods.[10]

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[6] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 5

[7] Peter Van den bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 6

[8] Peter van den bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 6

[9] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 7

[10] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 8

Meanwhile, new players introduced themselves into the international market. It is the international companies, their trade and investment that changed the global picture concerning development of the third world countries, as well as, their direct investment in the countries and wellbeing of their citizens. Another development in international trade worth noting is the increased trade within companies. The foreign sales of the largest 100 transnational corporations are equivalent in value to one-quarter of world trade; approximately two-thirds of all trade takes place within companies. The increase in trade within companies has been one of the most powerful forces behind the expansion of world trade. Next to international trade, an important aspect of economic globalisation is foreign direct investment (FDI).[11]

Besides the obvious economic benefits, there are other advantages of international trade. One of them is definitely the fact that people do not observe other nationalities with hostility anymore thus there are fewer reasons for wasting resources on wars. Moreover, different nationalities realize that they can profit through common cooperation. International trade not only has the potential for bringing economic benefits, there may also be considerable non-economic gains. International trade increases both the incentives for not making war and the costs of going to war. International trade intensifies cross-border contacts and exchange of ideas, which may contribute to better mutual understanding. In a free trading world, other countries and their people are more readily seen as business partners, less as enemies. On the contrary, a country taking trade restrictive measures directly inflicts economic hardship upon exporting countries. Therefore, trade protectionism is a festering source of conflict. Likewise, international trade can make an important contribution to peaceful and constructive international relations.[12]

However, for international trade to develop and grow even stronger so that its benefits are more obvious as well, many things should be done. Unfortunately, developing countries did not make progress to keep up with the developed countries. Their lack of infrastructure and educated workers prevent them from entering more markets. On the other hand, the developed countries did not open market completely. Resolving this problem would save a great number of people from poverty. This problem should be looked on the global level and all participants should be united to find a solution.

[11] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 9

[12] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 23

Chapter Two

History of the WTO

The reason why the WTO was introduced, was in order to ease the world trade and its implementation. WTO was the key element in breaking trade barriers. Established in 1995, the World Trade Organization (WTO) administers the trade agreements negotiated by its Members, in particular the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade related Intellectual Property Rights (TRIPS). The underlying philosophy of the WTO is that open markets and nondiscrimination are conducive to the national welfare of all countries. The raison d'etre of the WTO is to offer a mechanism to governments to reduce both their own trade barriers and those in foreign markets. Its primary functions are to be a focal point for the negotiation of binding agreements to reduce trade barriers and agree on disciplines for policies affecting international trade, and to provide a mechanism through which WTO Members can enforce these negotiated commitments.[13]

The idea of creating a single organization which would enhance the world trade has been omnipresent for years. What is more, the WTO has never been a completely new organization or idea. Namely, it is an organization which inherited numerous of rules of the old GATT system which have already existed and which were incorporated into the WTO. The organization is a stand-alone international institution. It is independent of the United Nations system (that is, it is not a UN specialized agency), in contrast to many other specialized international organizations such as WIPO, ITU, and UNCTAD. The WTO is the successor to the GATT, which it now subsumes. The GATT was never a formal international organization; it was an international treaty to which countries and independent customs territories could become a contracting party.[14]

In spite of the resemblance between these two systems there are also some striking differences that ought to be mentioned. In particular, there is a significant difference which can be seen in the fact that in the newly formed the WTO even the smallest power can challenge the greatest one and win to its advantage. The WTO as an organization is quite small and has very few powers. The Secretariat spans some 600 staff (professional and auxiliary), many of whom are translators and secretaries. It has limited responsibilities – essentially to manage meetings and prepare documentation at the request of Members, support dispute settlement proceedings and undertake periodic reviews of the trade policies of Members.[15] As is often stressed by Members, the WTO is a member driven organization, where each signatory has a voice. Even the smallest player can make its voice heard because decision-making is mostly on the basis of consensus. Thus, small countries can, and do, express their views and may block proposals that they do not support. Moreover, because the WTO is a rules-based system where disciplines are enforceable through an effective dispute settlement mechanism, the smallest Member may take on the most powerful country in the world.[16]

[13] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 1

[14] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 1

[15] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 4

[16] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 4

At one point it was clear that the existence of a new organization that would help the development of world trade was inevitable. Precisely, not following the rules and regulations caused many markets to close which was not favorable for any parties. Thus, there was a natural need for the existence of an organization which would have the power to enforce the rules prescribed. The genesis of the GATT in 1947 was the inter-war experience of beggar thy neighbor protectionism, competitive devaluation, and capital controls. Following the adoption of the so-called Smoot Hawley Tariff Act, which raised average US tariffs from 38 to 52 percent, US trading partners imposed retaliatory trade restrictions. A domino effect resulted, as trade flows were diverted to other markets, protectionist measures were taken there, and further retaliation ensued. Once the Second World War was over – indeed, before it was concluded – political leaders sought to establish international institutions to reduce the probability of a repeat performance. New international bodies were designed to manage international relations and monetary and exchange rates (the UN and the IMF) and to assist in financing reconstruction and promoting economic development (the World Bank). An international organization was also foreseen to manage trade relations, the International Trade Organization (ITO). Greater trade was expected to support an increase in real incomes, and non-discriminatory access to markets was expected to reduce the scope for political conflicts or trade disputes spilling over into other domains.[17]

The GATT 1947 process and the International Trade

The introduction of the GATT started with the efforts of the US to create an International Trade Organization. The reason why it was felt that such an organization was needed was in order to support the work of the World Bank and the International Monetary Fund.

The history of the GATT begins in December 1945 when the United States invited its war-time allies to enter into negotiations to conclude a multilateral agreement for the reciprocal reduction of tariffs on trade in goods. In July1945, the US Congress had granted President Truman the authority to negotiate and conclude such an agreement. These multilateral tariff negotiations took place in the context of a more ambitious project on international trade. At the proposal of the United States, the United Nations Economic and Social Committee adopted a resolution, in February 1946, calling for a conference to draft a charter for an 'International Trade Organization' (ITO). At the 1944 Bretton Woods Conference, where the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the 'World Bank') were established, the problems of trade had not been taken up as such, but the Conference did recognise the need for a comparable international institution for trade to complement the IMF and the World Bank. A Preparatory Committee was established in February 1946 and met for the first time in London in October 1946 to work on the charter of an international organization for trade.[18]

The negotiations were organized in three different parts. These tree parts included charter preparation, making an agreement on tariff reductions and creating clauses on tariff obligations. The GATT organization was actually formed based on the latter two parts of the negotiations.

[17] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 7

[18] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 78-79

The work was continued from April to November 1947 in Geneva. As John Jackson explained:

The 1947 Geneva meeting was actually an elaborate conference in three major parts. One part was devoted to continuing the preparation of a charter for a major international trade institution, the ITO. A second part was devoted to the negotiation of a multilateral agreement to reduce tariffs reciprocally. A third part concentrated on drafting the 'general clauses' of obligations relating to the tariff obligations. These two latter parts together would constitute the General Agreement on Tariffs and Trade. The 'general clauses' of the draft GATT imposed obligations on nations to refrain from a variety of trade-impeding measures.[19]

The GATT was well accepted in Geneva; while on the other hand, ITO charter had a problem with being put into force.

The negotiations on the General Agreement on Tariffs and Trade (GATT) advanced well in Geneva, and by October 1947 the negotiators had reached an agreement on the GATT. The negotiations on the ITO, however, were more difficult and it was clear, towards the end of the 1947 Geneva meeting, that the ITO Charter would not be finished before 1948. Although the GATT was intended to be attached to the ITO Charter, many negotiators felt that it was not possible to wait until the ITO Charter was finished to bring the GATT into force.[20]

The main fear of the negotiators was that they would spend their countries' political willingness and strength on putting the GATT into force, leaving no willingness and strength for organizing ITO charter. Therefore, they did not want to imperil the ITO Character but organize them as a package.

It was therefore decided to bring the provisions of the GATT into force immediately. However, this created a new problem. Under the provisions of their constitutional law, some countries could not agree to parts of the GATT without submitting this agreement to their parliaments. Since they anticipated the need to submit the final draft of the ITO Charter to their parliaments in late 1948 or the following year, they feared that 'to spend the political effort required to get the GATT through the legislature might jeopardise the later effort to get the ITO passed'. Therefore, they preferred to take the ITO Charter and the GATT to their legislatures as a package.[21]

In spite of the efforts that were invested in a successful completion of the ITO negotiations, the actual ITO charter never came into force. All due to the fact that the United States Congress failed to approve this proposal.

In March 1948, the negotiations on the ITO Charter were successfully completed in Havana. The Havana Charter provided for the establishment of the ITO, and sets out basic rules and disciplines for international trade and other international economic matters. The ITO Charter, however, never entered into force. While repeatedly submitted to the United States Congress, it was never approved.[22]

There were a certain number of countries which were preparing the background for the creation of the ITO in Havana, while almost simultaneously in New York negotiations were completed on General Agreement on Tariffs and Trade. The ITO was supposed to be the institutional framework to administer a set of legal documents referred to as the Havana Charter (HC), after the location where the final negotiation of the so-called Preparatory Committee was held in 1948. The ITO Charter

[19] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 79

[20] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 79

[21] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 80

[22] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 80

regulated trade in goods and commodity agreements, as well as subjects such as employment policy and restrictive business practices. At the same time, at Lake Success, New York, in early 1947, negotiations between 23 countries – 12 developed and 11 developing – were concluded on the General Agreement on Tariffs and Trade (GATT).[23]

In spite of all this preparation and the need for having such an instrument that would regulate international trade, the GATT never formally came into force. Namely, it was left with only provisional power due to the fact it was not formally accepted by the UN. The GATT entered into force on 1 January 1948, on a provisional basis, pending the conclusion and the entry into force of the Havana Charter. However, since the Havana Charter never came into force, for its entire 47 years the GATT applied on a ‘‘provisional’’ basis. Following the unwillingness of the US Congress to ratify the ITO Charter (6 December 1950), the GATT slowly developed into an institution of its own, despite the fact that its provisions do not refer to a specific institutional umbrella, as that function was supposed to be played by the ITO. Formally just an international agreement to liberalize trade in goods, de facto the GATT gradually evolved into an international institution. A consequence of the lack of institutional foundations was that GATT contracting parties operated on an ad hoc basis, with institutional innovations responding to observed needs. This ‘‘functional institutionalism’’ helped to ensure legitimacy because the edifice was built on generally agreed needs. The fact that all decisions were taken by consensus bolstered legitimacy further (consensus implied decisions were adopted as long as no party explicitly opposed them). Thus, while participants in the GATT were formally contracting parties to a treaty, they behaved as members operating under a sketchy ‘‘institutional’’ umbrella.[24]

During the negotiation period the focus was shifted from one topic to another which in the end resulted in changed polices. Contracting Parties conducted eight rounds of multilateral negotiations. Up to the Kennedy Round, negotiators were essentially preoccupied with the reduction of tariff barriers. However, the Kennedy Round shifted the focus of the negotiations to nontariff barriers (NTBs), which had begun to be viewed as a formidable obstacle to trade liberalization. Negotiators had originally understood the term NTBs to refer to nontariff barriers imposed for economic reasons (antidumping, countervailing, safeguards).[25]

The GATT policies were heavily influenced by the interest of its Members. Moreover, the interests of the Members expanded to include nontariff, disciplines on intellectual property and certain domestic policies. Over time, first through the negotiation of the Agreement on Technical Barriers to Trade (TBT) in the Tokyo Round and then through the re-negotiation of this agreement and negotiation of the Agreement on Sanitary and Phytosanitary Measures (SPS) during the Uruguay Round, trading partners began to negotiate on nontariff policies that were unconnected, in principle at least, to the competitive position of domestic industries. In the Uruguay Round, disciplines on intellectual property rights and trade in services were negotiated. Thus, the trading system was extended to cover a number of domestic policies affecting industrial structure and regulatory frameworks that were argued by some Members, most notably the United States, to impede ‘‘market access’’ abroad, even if they could not, across the board, plausibly be understood as discriminatory protection of domestic industries.[26]

[23] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 7

[24] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 8

[25] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 12

[26] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 12

From the GATT to the WTO

In The Punta Del Este Declaration a lot of strategic goals and ideas were set. Nevertheless, creating a new organization was not one of the priorities. The Punta del Este Declaration contained a very broad and ambitious mandate for negotiations. The Uruguay Round negotiations would cover, interalia, trade in goods, including trade in agricultural products and trade in textiles and clothing, as well as – for the first time in history – trade in services. The establishment of a new international organisation for trade was not, however, among the Uruguay Round's initial objectives.[27]

Great achievement in Uruguay Round was establishing, although on provisional basis, a Trade Policy Review Mechanism to secure that the GATT rules were applied properly. During the first years of the Uruguay Round negotiations, major progress was made with respect to all of the institutional issues identified in the Ministerial Declaration. In December 1988, at the Montreal Ministerial Mid-Term Review Conference, it was decided in principle to implement, on a provisional basis, a Trade Policy Review Mechanism to improve adherence to GATT rules.[28]

At the beginning of 90s the idea of creating a new organization began to emerge. First it came from an Italian Trade Minister and a few months later from Canada. The idea was that this organization should include the GATT; hence the proposal was made about the creation of the new world trade organization. At the time, however, the establishment of a new international trade organisation had not been discussed. It was the then Italian Trade Minister Renato Ruggiero (later the second Director-General of the WTO) who, in February 1990, first floated the idea of establishing a new international organisation for trade. A few months later, in April 1990, Canada formally proposed the establishment of what it called a 'World Trade Organization', a fully fledged international organisation which was to administer the different legal instruments related to international trade, including the GATT, the GATS and other multilateral instruments which were being developed in the context of the ongoing negotiations. A long the same lines ,the European Community submitted a proposal, in July 1990, calling for the establishment of a 'Multilateral Trade Organization'. The European Community argued that the GATT needed a sound institutional framework 'to ensure the effective implementation of the results of the Uruguay Round'.[29]

It could be said that Uruguay Round was not successful and it did not contain a foreclosure for the new trade organization. Moreover, Uruguay Round was suspended in April 1991. Nevertheless, a group of countries made a draft to establish Multilateral Trade Organization.

The December 1990 Brussels Draft Final Act, discussed at what was initially planned to be the closing conference of the Uruguay Round, did not contain an agreement with regard to a new international organisation for trade. Albeit for very different reasons, this conference was a total failure, and the Uruguay Round was subsequently suspended. In April 1991, however, the negotiations were taken up again, and, in November 1991, the European Community, Canada and Mexico drafted a joint proposal for an international trade organisation.This joint proposal served as the basis for further negotiations which resulted, in December 1991,in the draft Agreement

[27] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 83

[28] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 83

[29] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 83-84

Establishing the Multilateral Trade Organization. The latter agreement was part of the 1991 Draft Final Act, commonly referred to as the Dunkel Draft, after the then Director-General of the GATT.[30]

The United States were against establishing an international trade organization. The majority of the participants in the Round were keen on creating the World Trade Organization. Eventually, the only problem was the name and the fact that USA did not want that EU Communities have a priority over naming the new organization which is why instead of Multilateral Trade Organisation the name is World Trade Organization or the WTO.

The evolution of the legal framework of the GATT/WTO has been driven by political bargaining, with the terms of the bargain at any point in time (and changes over time) influenced by both governmental and non-governmental actors. Initially largely a tariff agreement, as average tariffs fell over time, and attention shifted to nontariff policies, the set of interest groups seeking to add agenda items changed. The importance of specific interest groups cannot be overstated. Thus, the extension of the WTO to include agreements on services and trade-related intellectual property rights was driven by a desire on the part of OECD industry groups (telecom providers, banks, pharmaceutical firms) to improve access to foreign markets for their products.[31]

The GATT imposed the foundation for the WTO. Namely, the WTO gained valuable experience through the GATT practice. Furthermore, using the GATT's experience was of great help for the WTO. As explained above, the GATT lacked an institutional structure – in the early years of its operation it did not even exist as an entity except when formal meetings of the contracting parties were held. It is precisely this gap that the WTO came to fill. However, the WTO did not start from a clean slate. A lot of the institutional design that the GATT put into place through, essentially, ''learning by doing,'' provided inspiration to the architects of the current world trade regime.[32]

While the goals of the GATT preamble share the goals of the WTO, which means they are aiming at better trade, standard and other benefits that come with it, free trade is not a priority.

The difference between the GATT and the WTO lies in the level of responsibility that the WTO Members have towards the organization, in their willingness to be a part of some agreement, obligation to dispute settlement mechanism, and in their level of transparency.

Principles of the WTO

The purpose of the WTO is not to control trade. On the other hand, as an organization it has its own principles that all of the Members need to oblige to. These principles are pillars of the organization and without them the WTO would be useless. In a nutshell, the WTO is both a mechanism for exchanging (trading) trade policy commitments, and agreeing on a code of conduct. The WTO comprises a negotiated set of specific legal obligations that regulate trade policies of member states. These are embodied in the GATT-1994, the GATS, and the TRIPS agreements. The WTO does not define or specify trade outcomes, i.e., it does not seek to manage trade flows. Seven dimensions of the WTO are of particular importance in understanding the operation and function of the institution:

1 single undertaking;

[30] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 84

[31] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 12

[32] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 14

2 tariffs are the only permissible form of protection;

3 non-discrimination;

4 reciprocity;

5 enforcement of obligations;

6 transparency;

7 safety valves.[33]

One of the characteristics of the obligations of the Members to the WTO is that the regulations are not to be changed in any way. This is important because it guaranties legal certainty to other Members. The second one provides its Members with an option to decide if they will accept them or not. The third one includes obligations which are bilateral. There are three layers of legal obligations that can be assumed when adhering to the WTO:

1 an inflexible, multilateral set of obligations: provisions that bind all Members upon accession. A country joining the WTO has no option but to abide by this set of obligations, which are reflected in the WTO Agreement itself and all its annexes (the so-called multilateral agreements);

2 a flexible, multilateral set of obligations: provisions that bind only those WTO Members which have acceded to the corresponding WTO legal instruments. Such obligations exist because the WTO law, besides the multilateral agreements, also allows the so-called plurilateral agreements, that is, agreements the participation to which is optional;

3 a bilateral set of obligations. These are sui generis obligations which are assumed by the acceding WTO Member and regulate in a specific manner its legal relations with the incumbent WTO Members.[34]

Protection through tariffs means that only tariffs are allowed because they are visible, easily monitored, and that quotas or other means that hinder trade are forbidden.

The principle of non-discrimination is divided into two parts. Most favored nation treatment gives a product the same treatment as the domestic product without questioning the product's origin. National treatment means that after the import procedure and taxes, this product cannot be treated less favorably than the domestic product. While there can be some exceptions for the custom unions and developing countries. The principle of non-discrimination has two components, the most favored nation (MFN) rule and the national treatment (NT) principle. The MFN rule requires that a product made in one Member country be treated no less favorably than a ''like'' (very similar) product that originates in any other country. National treatment requires that foreign products – once they have satisfied whatever border measures are applied (once they have paid their ''ticket to entry'' in a particular market) – be treated no less favorably than like or directly competitive domestic products. In both cases, the obligation is to provide foreign products treatment more favourable than that afforded to their domestic counterparts. A government is free to discriminate in favor of foreign products (against domestic goods) if it desires, subject, of course, to the MFN rule – all foreign products must be given the same treatment. While MFN applies unconditionally, exceptions are made for the formation of free trade areas or customs unions, preferential treatment of developing countries, and, as already noted, upon accession of a new Member, an existing Member may invoke the WTO's non-application clause (Article XIII).[35]

[33] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 15

[34] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 15

[35] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 16

MFN shelters smaller economies and gives them better chances in the market. It helps in reducing costs and trade barriers. Meanwhile, bargaining with one country represents bargaining with others and it is a great advantage. On the political side, MFN offers smaller countries a guarantee that larger countries will not exploit their market power against them, or give better treatment to competitors for foreign policy reasons. MFN also helps maintain cooperation by raising the costs to a country of defecting from its negotiated commitments. If it desires to raise trade barriers, it must apply these to all WTO Members. This raises the political cost of backsliding, gives greater incentives for domestic pro-trade interests to support negotiations in the WTO and thus enhances the credibility (value) of commitments. Finally, MFN reduces negotiating costs – once a negotiation has been concluded with a country, the results extend to all.[36]

When it comes to negotiating, there is a rule which cannot be characterized as a legal principle, however, it is considered to be one of the basic principles that guide the process of negotiation. What is more, the main goal of this principle is to limit free riding which can expand to excessive extents due to the MFN rule.

Reciprocity is a basic principle that applies to negotiations. It is not a legal principle. It is aimed at limiting the scope for free riding that may arise because of the MFN rule and the desire to obtain a quid pro quo for own trade liberalization.[37]

The rationale for reciprocity can be found in the political economy literature. Costs of liberalization generally are concentrated in specific industries, which often will be well organized and oppose reductions in protection. Benefits, while in the aggregate usually greater than costs, accrue to a much larger set of agents, who thus do not have a great individual incentive to organize themselves politically. By obtaining a reduction in foreign import barriers as a quid pro quo for a reduction in domestic trade restrictions, specific export-oriented domestic interests that will gain from liberalization have an incentive to support it in domestic political markets.[38]

Countries became Members of the WTO because, among other things, they want legal security. If one of the Members does not fulfill its obligations, it can be enforced through the mechanism of the WTO. Because of its nature, private parties cannot pursue their rights in front of the WTO. If a country perceives that actions taken by another government have the effect of nullifying or impairing negotiated market access commitments or the disciplines of the WTO, it may bring this to the attention of the government involved and ask that the policy be brought into compliance. If satisfaction is not obtained, it may invoke WTO dispute settlement procedures. These involve the establishment of panels of impartial experts who are charged with determining whether a contested measure violates the WTO. Because the WTO is an inter-governmental agreement, private parties do not have legal standing before the WTO's dispute settlement body.[39]

If a party is not satisfied and considers that their rights are hindered it can start the WTO dispute settlement procedure. Although this procedure is complicated, it is effective and Panels come with the decision which restores the order of things. If a country perceives that actions taken by another government have the effect of nullifying or impairing negotiated market access commitments or the disciplines of the WTO, it may bring this to the attention of the government involved and ask that the policy be brought into compliance. If satisfaction is not obtained, it may invoke WTO dispute settlement procedures. These involve the establishment of panels of impartial experts who are charged with determining whether a contested measure violates the WTO.[40]

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[36] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 17

[37] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 17

[38] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 18

[39] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 18

[40] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 18

Not only do the Members need to be transparent in their trade policies, but they are obliged to have institutions that will provide to the WTO. Numerous agreements are made to comply with these obligations and there are various WTO mechanisms that support these responsibilities. The Trade Policy Review Mechanism has the biggest role in this sector. WTO Members are required to publish their trade regulations, to establish and maintain institutions allowing for the review of administrative decisions affecting trade, to respond to requests for information by other Members, and to notify changes in trade policies to the WTO. There are over 200 notification requirements embodied in the various WTO agreements and decisions. All of these require the existence of appropriate bodies or agencies in Members that have the responsibility of satisfying them. These internal transparency requirements are supplemented by multilateral surveillance of trade policies by WTO Members, facilitated by periodic country-specific reports (Trade Policy Reviews) that are prepared by the Secretariat and discussed in the WTO Council – the so-called Trade Policy Review Mechanism.[41]

On some conditions, the Members need to hinder trade. The WTO allows this under the following circumstances: with the aim of protecting public health or national security and saving endangered industries. The WTO recognized the need for the society to be calm. The protection of industries is objectified with the national interest in some types of industries that would collapse under foreign investment or domestic problems. That is why the WTO introduced safety valves principle. The WTO recognizes that governments may need flexibility to restrict trade in specific circumstances. Three types of provisions allow for the use of trade measures: to attain non-economic objectives, ensure ‘‘fair competition,’’ and intervention in trade for economic reasons. The first include provisions allowing for policies to protect public health or national security, and to protect industries that are seriously injured by competition from imports. The underlying idea in the latter case is generally that governments should have the right to step in when competition seriously injures domestic competitors. Although not explicitly mentioned in the relevant WTO agreement, the underlying rationale for intervention is that such competition causes political and social problems associated with the need for the industry to adjust to changed circumstances. Second, ‘‘fair trade’’ type of measures include the right to impose countervailing duties on imports that have been subsidized and antidumping duties on imports that have been dumped – sold at a price that is below that charged in the host market. Finally, the third type of ‘‘safety valve’’ allows for actions to be taken if there are serious balance-of-payments difficulties, or if a government desires to support an infant industry. In other words, one way to present the GATT is as follows: trading nations exchange promises about default tariffs, and about state contingency tariffs, the latter corresponding to contingencies ranging from health-related to producer welfare-related concerns.[42]

[41] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 19

[42] Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization* (1st edn, Routledge 2007) 19-20

Objectives and functions of the WTO

The reasons for establishing the WTO and the policy objectives of this international organisation are set out in the Preamble to the WTO Agreement. According to the Preamble, the Parties to the WTO Agreement agreed to the terms of this agreement and the establishment of the WTO:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ... Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development ..[43]

The ultimate objectives of the WTO are thus:

* the increase of standards of living;

* the attainment of full employment;

* the growth of real income and effective demand; and

* the expansion of production of, and trade in, goods and services.[44]

However, it is clear from the Preamble that in pursuing these objectives the WTO must take into account the need for preservation of the environment and the needs of developing countries. The Preamble stresses the importance of sustainable economic development and of the integration of developing countries, and in particular least-developed countries, in the world trading system. Both of these aspects were absent from the Preamble to the GATT 1947.[45]

In the broadest of terms, the primary function of the WTO is to:

provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement.[46]

More specifically, the WTO has been assigned six widely defined functions. Article III of the WTO Agreement states:

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

[43] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 86

[44] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 86

[45] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 86

[46] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 88

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the ‘‘Dispute Settlement Understanding’’ or ‘‘DSU’’) in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the ‘‘TPRM’’) provided for in Annex 3 to this Agreement. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.[47]

The major function of the WTO is to monitor the implementation of the WTO agreements.
Implementation of the WTO agreements

A first function of the WTO is to facilitate the implementation, administration and operation of the WTO Agreement and the manifold multilateral and plurilateral agreements annexed to it. The WTO is also entrusted with the task of furthering the objectives of these agreements.[48]

The committee of safeguards includes various obligations. To number some of them: monitoring the implementation, monitoring if procedural requirements are completed, assisting Members. This is a function that requires almost the whole organization of the WTO to include. Pursuant to Article 13 of the Agreement on Safeguards, the tasks of the Committee on Safeguard include:

a. to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

b. to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

c. to assist Members, if they so request, in their consultations under the provisions of this Agreement; ...[49]

This function of facilitating the implementation, administration and operation of the WTO agreements and furthering the objectives of these agreements is an essential function of the WTO. It involves most of its bodies and takes up much of their time.[50]

A second function of the WTO is to provide a permanent forum for negotiations amongst its Members. These negotiations may concern matters already dealt with in the WTO agreements but

[47] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 88

[48] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 89

[49] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 89

[50] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 89

may also concern matters currently not yet addressed in WTO law. With regard to negotiations on matters already covered, the WTO is 'the' forum for negotiations while, with regard to negotiations on matters not yet addressed, it is 'a' forum among others. To date, WTO Members have negotiated and concluded five trade agreements, in the framework of the WTO, providing for:

* further market access commitments for specific services and service providers (on financial services in 1995 and 1997,39 on basic telecommunications services in 199740 and on the movement of natural persons in 199541); and

* the liberalisation of trade in information technology products in 1996.[51]

Dispute settlement is a system that enables the WTO decisions to be respected. It also secures that its decisions are conducted. Not only does dispute settlement make the WTO Member follow its obligation, but it also protects their rights. A third and very important function of the WTO is the administration of the WTO dispute settlement system. As stated in Article 3.2, first sentence, of the DSU:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The prompt settlement of disputes under the WTO agreements is essential for the effective functioning of the WTO and for maintaining a proper balance between their rights and obligations of the Members.[52]

The TRPM follows and review practices of all Members. If the percentage in the world trade were greater, the trade policy would be reviewed more often. There are two types of report: the one made by the Member itself and the other one made by the WTO Secretariat. These reports are published. A fourth function of the WTO is the administration of the trade policy review mechanism (TPRM). The TPRM provides for the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. The purpose of the TPRM is:

* to achieve greater transparency in, and understanding of, the trade policies and practices of Members; and

* to contribute, in this way, to improved adherence by all Members to rules, disciplines and commitments made under the WTO agreements.[53]

Under the TPRM, the trade policies and practices of all Members are subject to periodic review. The frequency of review is determined by reference to each Member's share of world trade in a recent representative period. The four largest trading entities, i.e., the European Communities, the United States, Japan and Canada, are subject to review every two years. The next sixteen are reviewed every four years. Other Members are reviewed every six years, except that a longer period may be fixed for least-developed-country Members. The trade policy reviews are carried out by the Trade Policy Review Body (TPRB) on the basis of two reports: a report supplied by the Member under review, in which the Member describes the trade policies and practices it pursues; and a report, drawn up by the WTO Secretariat, based on the information available to it and that provided by the Member under review. These reports, together with the concluding remarks by the TPRB Chairperson on a Member's review and the minutes of the meeting of the TPRB are published shortly after the review and are a

[51] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 90

[52] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 94

[53] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 94-95

valuable source of information on a WTO Member's trade policy. The TPR reports and the minutes of the TPRB are available on the Documents Online database of the WTO as WT/TPR/ ... documents.[54]

Alongside with the trade policy review, the TPRM also monitors the international trade and its annual impact. Apart from carrying out individual trade policy reviews, the TPRB also undertakes an annual overview of developments in the international trading environment which have an impact on the multilateral trading system. To assist the TPRB with this review, the Director-General presents an annual report setting out the major activities of the WTO and highlighting significant policy issues affecting the trading system.[55]

The cooperation with other organizations is of great importance to the WTO because it leads to better coordination in global economy. Numerous agreements and joint ventures were brought up along the way. A fifth function of the WTO is to cooperate with international organisations and non-governmental organisations. Article III:5 of the WTO Agreement refers specifically to cooperation with the IMF and the World Bank. Such cooperation is mandated by the need for greater coherence in global economic policy-making. The 'linkages' between the different aspects of global economic policy (financial, monetary and trade) require that the international institutions with responsibilities in these areas follow coherent and mutually supportive policies.[56]

The WTO has made cooperation arrangements with, inter alia, the World Intellectual Property Organization (WIPO) and the United Nations Conference on Trade and Development (UNCTAD). In these and other international organisations the WTO has observer status. The WTO and UNCTAD cooperate in a joint venture, the International Trade Centre (ITC). The ITC works with developing countries and economies in transition to set up effective trade promotion programmes to expand their exports and improve their import operations.[57]

Although helping the developing countries is not the primary function of the WTO, this was recognized as one of its priorities. In order for developing countries to feel the full benefits of being Members, the WTO brought up a set of arrangements. This was particularly introduced during the DOHA round. The functions of the WTO listed in Article III of the WTO Agreement do not explicitly include technical assistance to developing-country Members. Yet this is, in practice, an important function of the WTO. Of course, it could be argued that this function is implied in the other functions discussed above, in particular the function of facilitating the implementation, administration and operation, and of furthering the objectives, of the WTO Agreement. However, in view of its importance, it deserves to be mentioned separately. In order to exercise their rights and obligations under the WTO Agreement, to reap the benefits of their membership of the WTO and to participate fully and effectively in trade negotiations, most developing-country Members need to have significantly more expertise in the area of trade law and policy. This is recognised in many WTO agreements, including the SPS Agreement, the TBT Agreement, the TRIPS Agreement, the Customs Valuation Agreement and the DSU, which all specifically provide for technical assistance to developing-country Members.

This technical assistance may take the form of bilateral assistance, given by developed-country Members, or multilateral assistance, given by the WTO Secretariat. At its Doha Session in November 2001, the Ministerial Conference declared that:

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[54] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 95

[55] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 97

[56] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 97

[57] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 98

technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system.[58]

As an essential element of the Doha Development Agenda, in 2002, the WTO embarked on a programme of greatly enhanced support for developing countries.[59]

Institutions of the WTO

The basic institutional structure of the WTO is set out in Article IV of the WTO Agreement. Subordinate committees and working groups have been added to this structure by later decisions. There are, at present, a total of seventy WTO bodies, of which thirty-four are standingbodies. Many of these WTO bodies meet on a regular basis, making for a heavy workload for WTO diplomats. In 2001, WTO bodies held nearly 1,000 formal and informal meetings. Sometimes as many as four or five formal meetings were convened at the same time. For many developing country Members, with no or a very small permanent delegation in Geneva, this is a serious problem.[60]

The institutional structure of the WTO includes, at the highest level, the Ministerial Conference, at a second level, the General Council, the DSB and the TPRB and, at lower levels, specialised councils, committees and working parties. Furthermore, this structure includes quasi-judicial and other non-political bodies, as well as the WTO Secretariat.[61]

The highest body of the WTO is the Ministerial Conference. In particular, its composure and power regarding agenda, and the fact that it has the authority, puts this body on top of the organization. The Ministerial Conference is the 'supreme' body of the WTO. It is composed of minister-level representatives from all Members and has decision-making powers on all matters under any of the multilateral WTO agreements. However, it is not clear whether this very broad power to make decisions, in fact, enables the Ministerial Conference to take decisions which are legally binding on WTO Members.[62]

While this presents great power, Ministerial Conference has also other powers. In addition to this very broad decision-making power, the Ministerial Conference has been explicitly granted a number of specific powers, such as:

* adopting authoritative interpretations of the WTO agreements;

* granting waivers;

* adopting amendments;

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[58] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 100

[59] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 100

[60] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 120

[61] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 120

[62] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 123

* decisions on accession; and

* appointing the Director-General and adopting staff regulations.[63]

Underneath the Ministerial Conference is the General Council. Although the level of diplomatic representatives in this body is lower than in the Ministerial Conference, the General Council and its Chairperson are crucial for the organization of work. It is directly responsible for everyday functioning of the WTO and is also directly responsible for putting the decisions of Ministerial Conference into effect. The General Council is composed of ambassador-level diplomats and normally meets once every two months. All WTO Members are represented in the General Council. As with all other WTO bodies, except the Ministerial Conference, the General Council normally meets on the premises of the WTO Secretariat in Geneva. Each year, the General Council elects its Chairperson from the members of the Council. The Chairperson of the General Council holds the highest elected office within the WTO. The General Council is responsible for the continuing, 'day-to-day' management of the WTO and its many activities. In between sessions of the Ministerial Conference, the General Council exercises the full powers of the Ministerial Conference.[64]

The meetings and minutes of General Council are secret. However there is usually press conference after all meetings. Documents are restricted until they are open in public under regulation. In practice, the General Council always meets behind closed doors. After the meeting, the Chairperson may issue a communique to the press. The Chairperson and/or the Director-General, assisted by the WTO spokesperson, usually hold a press conference after the meeting. The minutes of a meeting of the General Council (as are the minutes of meetings of all WTO bodies except the TPRB) are 'restricted' documents, i.e. not available to the public, until they are 'de-restricted' under the rules on the de-restriction of official documents.[65]

The WTO agreement assigned to General Council discharges the responsibilities of the Dispute Settlement Body and the Trade Policy Review Body. Both of these bodies have their Chairperson and their rules. It can be said that General Council is one head with tree bodies. The General Council, the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB) are, in fact, the same body. The DSB and the TPRB are the alter ego of the General Council; they are two emanations of the General Council. When the General Council administers the WTO dispute settlement system, it convenes and acts as the DSB. When the General Council administers the WTO trade policy review mechanism, it convenes and acts as the TPRB. To date, the DSB and the TPRB have always had a different Chairperson than the General Council, and both the DSB and the TPRB have developed their own Rules of Procedure, which take account of the special features of their work. The DSB has a regular meeting once a month, but may have additional meetings in between.[66]

The lower level of organization includes different councils. At the level below the General Council, the DSB and the TPRB, there are three so-called specialised councils: the Council for Trade in Goods (CTG); the Council for Trade in Services (CTS); and the Council for TRIPS.[67]

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[63] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 123

[64] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 124

[65] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 125-126

[66] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 126

[67] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 127

However, the WTO has more mechanisms that enable its functioning. It seems that the councils can help only with some functions so, besides them, there are special committees and working parties.

In addition to the three specialized councils, there are a number of committees and working parties that assist the Ministerial Conference and the General Council in carrying out their functions. The committees include the important Committee on Trade and Development.[68]

Given that there are a lot of Members in the WTO, it would be inefficient for all of them to participate in the negotiations. However, it is clear that it is impossible to negotiate effectively with such a large number. Therefore, in the GATT 1947 and now the WTO, mechanisms have been developed to reduce the number of countries actively participating in the deliberations of WTO bodies.[69]

It can be said that elite Members were organizing meetings in the Green Room. The invitation of the Director-General was essential for being able to attend these meetings. The countries which were the strongest economically were always present, whilst the developing countries were presented by the largest economies amongst them. In the days of the GATT 1947, contentious issues were often hotly debated in 'green room meetings', named after a conference room next to the office of the Director-General. These green room meetings, bringing together about twenty or so delegations at the invitation of the Director-General, Green room meetings (i.e. inner circle meetings) comprise of usually no more than twenty Members, including the Quad, Members deemed to have a vital interest in the issue under discussion and developing-country Members that play a leading role such as Brazil, India, China and South Africa.[70]

The WTO Secretariat

Based in Geneva although not large in staff Membership, it has an important function in the WTO organization. The WTO Secretariat is based in Geneva, and has a staff of about 600 persons. This makes it undoubtedly the smallest Secretariat of any of the major international organisations. Note that in the mid-1990s the FAO cut staff, at its headquarters in Rome, by more jobs than there were at the time in the whole WTO Secretariat. As discussed below, the Secretariat's prime function is to keep the WTO network operating smoothly.[71]

It is the Director-general who leads its operations. The Director-General has no decision making authority. All the decisions depend on the Members. And while it appears that they share a small part, the Director-General and the WTO Secretariat still have important roles.

The Secretariat is headed by a Director-General, who is appointed by the Ministerial Conference. Ministerial Conference adopts regulations setting out the powers, duties, conditions of service and the term of office of the Director-General.[72]

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[68] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 128

[69] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 131

[70] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 131-132

[71] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 135

[72] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 135

The WTO is a 'Member-driven' organisation. The Members – and not the Director-General or the WTO Secretariat – set the agenda and take decisions. Neither the Director-General nor the WTO Secretariat has any decision-making powers. The Director-General and the WTO Secretariat act primarily as an 'honest broker' in, or a 'facilitator' of, the decision-making processes within the WTO. They seldom act as initiators of proposals for action or reform. In such a seemingly modest role, the Director-General and the WTO Secretariat can, however, make an important contribution to helping Members to come to an agreement or decision.[73]

Although when observed through these duties Secretariat might seem as it is only an executive body, its main duties are vital for proper functioning of the WTO. The main duties of the WTO Secretariat are:

* to provide technical and professional support for the various WTO bodies;

* to provide technical assistance to developing-country Members;

* to monitor and analyse developments in world trade;

* to advise governments of countries wishing to become Members of the WTO; and

* to provide information to the public and the media.[74]

The WTO Director-General leads Secretariat and is assisted by the deputies; that is, senior management, and is there for a limited period of time. As noted above, the WTO Secretariat is headed by the WTO Director-General. The Director-General is assisted by four Deputy Directors-General (DDGs), also political appointees, serving for a limited period of time. They are appointed by the Director-General – in consultation with WTO Members – and form, together with the Director-General, the senior management of the WTO Secretariat.[75]

The WTO Secretariat is divided into Divisions which have their own function and are liable directly to the deputies or the Director. One of the important functions is facilitating the Institute for Training and Technical Cooperation which educate staff and ease the implementation of the WTO facilities. The Secretariat is multinational and it includes nations from the developing countries. The WTO Secretariat is organised into Divisions with a functional role (e.g. the Rules Division, the Services Division and the Market Access Division), an information and liaison role (e.g. the Information and Media Relations Division) and a supporting role (e.g. the Administration and General Services Division and the Language Services and Documentation Division). Divisions are normally headed by a Director who reports to one of the WTO's four Deputy Directors-General or directly to the Director-General. In addition to Divisions, the WTO Secretariat also includes the Institute for Training and Technical Cooperation (ITTC), often referred to as the Training Institute, which was established in 2003 to ensure a coherent and coordinated approach to capacity-building and technical assistance. The Director-General appoints the staff and determines their duties and conditions of service in accordance with the Staff Regulations adopted by the Ministerial Conference. About sixty different nationalities are represented in the staff of the WTO Secretariat. Nationals of France, the United Kingdom, Spain, Switzerland, Canada and the United States (in order of importance) are best represented among the staff. The representation of developing-country nationals in the staff is

[73] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 137

[74] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 138

[75] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 139

growing but remains a matter of concern. Only nationals of WTO Members can be officials of the WTO Secretariat but there are no formal or informal national quota.[76]

[76] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 139

Chapter Three

Relevant Rounds and issues that preceded the Doha Round

When observing the achievements of the Doha Round, the consideration of previous Rounds cannot be overlooked. The previous rounds showed a pattern that is recognizable in the trade system. Any analytical account of the Doha Round of the MTNs must logically take into consideration the achievements, or a lack thereof, during the post-Uruguay Round period. It should also benefit from the lessons from the ignominious Seattle debacle. It is crucial to take a look at the events surrounding these two events, because they are a sort of Rorschach test of how different constituencies view the multilateral trading system.[77]

The Uruguay Round established two new institutions and lead international trade into a new era. The Uruguay Round is widely regarded as the most comprehensive of the GATT rounds, with 123 contracting parties (CPs) participating in it. The decision to create two novel institutions, namely the WTO and the General Agreement on Trade in Services (GATS) was taken during the Uruguay Round. It was a veritable milestone and is justly celebrated for the innovations it represented. When it was launched in September 1986, at the initiative of the USA, with limited support from the other industrial economies, the developing economies – a fairly diverse group – were somewhat apprehensive about its launch.[78]

The Uruguay Round integrated developing countries into the international trade system and also intended to reform agricultural policies. Completion of the Uruguay Round ushered in a revitalized multilateral trading system in a globalizing world of greater integration. It also marked the beginning of the critical process of integrating the developing economies – or at least some sub-groups of them – into the global trading system. For the first time it was decided that no exceptions to the rules would be allowed for specific sectors or products. Therefore, the multi-fibre agreement (MFA) was scheduled to be phased out by the end of 2005, and more importantly it was agreed that trade in agriculture would be brought under the same multilateral trading system as that in other commodities. Correction of these two major flaws in the multilateral trade regime was attempted for the first time. Trade rules were also extended to services, trade-related aspects of intellectual property rights (TRIPs), trade-related investment measures (TRIMS) and government procurement.[79]

As it turns out, the planed reforms did not reach the point of realization. There were a few hindering issues. Particularly, those were the postponing of the reforms, the liberalization of agriculture, and huge costs that reforms required. First, post-Uruguay Round events did not reflect the scenarios that were projected by the Uruguay Round. The reforms that were recommended, and that were going to be the sources of welfare gains, did not proceed as expected. The Agreement on Textiles and Clothing (ATC) is a typical case in point. Dismantling the quotas in textiles and clothing did not follow the predetermined structured pattern; instead, the reforms were postponed for the final stage of the 10-year period. The tariffication of agriculture, which was intended to liberalize this important sector and improve the market access of developing countries, was not implemented as visualized. Finally, the cost of implementing the Marrakesh Agreement – which was significant – was completely ignored by those who projected welfare gains for the developing economies from the Uruguay Round. What was

[77] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 12-13

[78] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 13

[79] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 13

worse was that many of the developing economies were discontented with both the non-transparent manner in which the negotiations were conducted and their outcome.[80]

The developing countries main areas of interest have been neglected and the disparity in the tariff structure worsened for the developing countries. The priority areas of the developing economies – like agriculture and textiles and apparels – only benefited marginally in this respect. Consequently the asymmetry that had existed in multilateral trade before the pre-Uruguay Round period worsened. This was reflected in the post-Uruguay Round tariff structure of the Organization for Economic Cooperation and Development (OECD) economies; the average OECD tariffs for imports from the developing economies was four times higher than imports from the other OECD economies, and post-Uruguay Round protection to agriculture was found to be much higher in the OECD economies.[81]

The US President had the idea to settle the issues concerning trade. President Clinton invited the WTO members to hold the Third Ministerial in Seattle, Washington, and the trade ministers of 135 member countries accepted the invitation to define the trade agenda and negotiations on trade regimes and issues for the next millennium.[82]

The Seattle Ministerial Conference was well structured and organized. The modus operandi for the Seattle Ministerial Conference was devised as follows. Five working or negotiation groups were planned, each to be chaired by a trade minister and that could be divided into sub-groups. Singapore was to chair the negotiating group on agriculture, Lesotho that on market access, and Hong Kong SAR on the four Singapore issues.[83]

The negotiation process was structured in such a way so that the topic was considered by the Members for which this topic was most relevant. In addition to this, the new "Green Room" guarantied more influence for the developing countries in decision making. Although the negotiating procedure was not decided, each group would have comprised 15–20 WTO members. The country participation was to be determined on the basis of a participating country's economic weight as well as the special interest a country might have in a given theme. A new 'Green Room' was planned for the Seattle Ministerial; if the working group reached a consensus, the text was to be introduced in the Green Room. The Green Room was to comprise 15–20 country delegations representing different regions of the global economy, and at different levels of economic development. Eventually the Green Room consensus was to be presented to the full WTO membership, which ultimately needed to approve it.[84]

Noticeable changes occurred because of the Seattle negotiation failure. The failure in Seattle brought about a discernible shift in the multilateral trading system. Trade ministers of the member countries were going to review the implementation of the WTO agreements during the four days of plenary sessions, and during the closing session, were expected to launch the next round of MTNs, and, based on its timing, they were possibly going to name it the Millennium Round.[85]

Although the Seattle Ministerial Conference was a failure, it provided the Members with the possibility to deliberate about the trade topics. Despite the good presage, the Third Ministerial Conference turned out to be a complete, if somewhat ignominious, failure and the Millennium Round could never be launched. The silver lining behind this cloud was that it provided a much-needed

[80] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 14

[81] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 15

[82] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 16

[83] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 17

[84] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 17

[85] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 17

opportunity to stakeholders to deliberate and debate the significance of trade for achieving the Millennium Development Goals (MDG).[86]

Working groups did not have a significant breakthrough in the issues which they scrutinized, and above all, Singapore issues were at a dead point. Aside from the release of some heavily bracketed text in the areas of agriculture, implementation and market excess, there were few advances made in reaching substantive agreement on most issues. Bracketed text implies disagreement over the bracketed part of the text; it has been a common practice during negotiations to have large parts of a text in parentheses. No text could be issued on the Singapore issues because the positions of the participants were so far apart that no reconciliation was feasible. Many delegations did not see any point in starting negotiations.[87]

While the idea of a new ”Green Room” was excellent, it was not effective. This was due to the fact that the US representative had to impose their will on the Members, and dictate the way the developed and developing countries' representatives will behave. During the third Ministerial the Green Room process turned out to be totally dysfunctional. Besides, the conference dynamics adopted by the US Trade Representative was seemingly undemocratic. On the second day she announced her 'right' as chairperson to use procedures of her own choosing to reach a declaration in the name of the Ministerial Conference. She, with the Director General of the WTO, set up several Green Room meetings on issues where disagreements existed. Putatively, the plan was to get the major trading economies to agree among themselves, apply pressure on the major developing economies to participate in a Green Room meeting, and then pull together a third Ministerial declaration to launch a new round of MTNs, which all the 135 members would be asked to accept in a general meeting on the last day.[88]

The meetings in the Green Room remained transparent for many Members, which was a source of great malaise. For the first time, the number of participating members was as large as 135. As the majority of them had not participated in the Green Room process, they felt marginalized. They were not even onlookers because they were not informed about what was going on in the Green Room meetings. Their discomfiture knew no bounds on the third day of the Ministerial Conference when trade ministers from several African countries, the Caribbean Community, and some Latin American economies complained about a lack of transparency in the negotiation process. The WTO was resoundingly criticized for its lack of transparency. They felt that they were excluded from the deliberations on issues vital for their growth, and therefore did not feel obliged to support a draft Ministerial Declaration text produced without their knowledge or consent. On the final day the draft declaration stood without support from a large number of members, and the Seattle Ministerial had to be suspended without a declaration.[89]

Big industrial economies had the upper hand in the international trade. In the meanwhile, the situation changed and new countries became important players in the trade field. As the industrial economies overwhelmingly dominated multilateral trade, they also dominated the MTNs and the agenda-making procedures and exercises during the pre-Uruguay Round period. Members of the Quad, namely the EU, Canada, Japan and the USA, have dominated global trade in terms of value and volume, with a clear supremacy over the system even during the Uruguay Round. The global economy has undergone a considerable transformation since then, and several other country groups have emerged that are

[86] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 18

[87] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 20

[88] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 20

[89] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 20

making their presence felt globally. Important in this regard are the emerging-market economies (EMEs) and the newly-industrialized economies (NIEs).[90]

Objectives of the Doha Round and obstacles in process

The Doha Round intended to offer some more opportunities to the group of the developing countries. The broad framework of the Doha Round was being given more attention by members than in the past, in an attempt to strike a balance between the interests, priorities and tangible outcome of an MTN for both industrial and developing economies alike. The latter group is pragmatically subdivided into the EMEs and the NIEs on the one hand, and the low income developing economies on the other, and their trading and economic priorities are markedly different.[91]

Few of these priorities had changed as the Doha Ministerial approached. Nevertheless, the decision to launch the Doha Development Agenda was arrived at the Doha Ministerial Conference in November 2001. Consensus on the same subject that had proved so problematic only two years ago was a product of three factors. First, partly in response to the debacle at Seattle, and especially as a reaction to the tragic events of 9/11, many countries were coming around to the view that a major gesture was needed to preserve the last vestiges of multilateral cooperation. Second, in the aftermath of Seattle, a conscious attempt had been made to improve at least some of the decision-making processes leading up to the Ministerial Conference. The WTO also began to improve its external transparency with improved information availability for NGOs. But third, many of the coalitions of developing countries broke ranks in the endgame at Doha as their member countries were bought off through various bilateral deals. Aileen Kwa provides an interesting account of the various carrots and sticks that were used in the run-up to Doha and at the ministerial itself to break the opposition of developing countries.[92]

At first, the developing countries had a guard towards having a new round of negotiations, in spite of the fact that the new round major objectives were to resolve the issues that bothered the developing countries the most. Although a new round of trade negotiations was effectively launched at Doha in spite of the opposition of developing countries, the active participation of developing countries was not entirely in vain. Perhaps the biggest indicator of a newfound sensitivity in the WTO to development concerns is the fact that the new round was given the name of the 'Doha Development Agenda'. Paragraph 2 of the main Ministerial Declaration states: 'The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.'[93]

The possibility to elevate the economics of the developing countries was the priority in the Doha Round. In Doha, much time and words were devoted to the interests of developing countries. The title of the new round is a tribute to the objective of creating a multilateral trading order in which '...trade can play a major role in the promotion of economic development and the alleviation of poverty' (WTO 2001: Para. 2).[94]

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[90] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 34

[91] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 34-35

[92] Amrita Narlikar, *The World Trade Organization: A Very Short Introduction* (1st edn, Oxford University Press 2005) 102-103

[93] Amrita Narlikar, *The World Trade Organization: A Very Short Introduction* (1st edn, Oxford University Press 2005) 104-105

[94] Pitou van Dijck and Gerrit Faber, *Developing Countries and the Doha Development Agenda of the WTO* (1st edn, Routledge 2006) 3

The DDA recognized the urges of the developing countries for new medicines and interpreted the TRIPS Agreement in a way that was favorable for the developing countries. Two more declarations complemented the Ministerial Declaration: one on 'the TRIPS Agreement and public health' and one on 'implementation-related issues'. The former was to deal with a conflict that had arisen between developing countries and developed countries over the price of medicines to treat HIV/AIDS and some other tropical diseases. As the declaration puts it: '...the TRIPS Agreement does not and should not prevent members from taking measures to protect public health' (WTO 2001b). The TRIPS Agreement should be interpreted 'in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines'. The latter declaration reaffirms earlier agreements and urges members to apply measures in favour of developing countries such as early liberalization of clothing and textiles imports, and support for the implementation of standards.[95]

The main goal of the Doha Round was to integrate the developing countries into the international trade. For the majority of products, the tariffs were on a lower level, while in some they remained high. The DDA has development as its main objective. Given the relatively high rates of growth in large parts of the developing world during recent years, and the increased orientation of the major trading nations towards international markets including markets of developing countries, the latter group of countries has become more active and demanding in international negotiations. This makes the nature of the DDA different as compared to previous rounds of negotiations in several respects. Up to the Uruguay Round, developed countries exchanged concessions on manufactured products and non-agricultural commodities primarily among themselves. Consequently, barriers to trade in these products have been reduced to very low levels. However, for labour-intensive and temperate zone agricultural products tariffs remained high. Most tariff peaks in developed countries are concentrated in these product groups. Such products constitute a significant share of developing countries 'exports.[96]

The DDA covers a broad range of topics which, in order to be successful in the implementation, have to be approached as a single undertaking. The deliberations on the DDA show that the negotiations for further trade liberalization are complex and strongly interrelated. At the same time, it is precisely the broadness of the range of subjects that should facilitate an overall agreement. This overall agreement 'shall be treated as a single undertaking'(WTO 2001a: Para. 47). If member countries could opt out of parts of the overall agreement, the consensus or 'overall balance' (WTO 2001a: Para. 49) that underpins the agreement would crumble, leading to a breakdown in the negotiations.[97]

Some of the difficulties are reaching a decision that corresponds to the interests of the Members regarding their number and making these decisions transparent. Another complication is the large number of negotiating parties that all have to accept a package, with WTO membership increasing from 124 at the time of conclusion of the Uruguay Round to nearly 150 in 2005. The Doha Declarations promise that the negotiations will be transparent, 'in order to facilitate the effective participation of all' (WTO 2001a: Para. 49, also Para. 10). This is to rule out deal-making among a small number of major players that puts the rest of the membership before a fait accompli.[98]

During the years the NGO sector became an important segment of the international trade, and the WTO goal was to make a fair and transparent dialog with them. Transparency is also an objective of the WTO in its relationships with nongovernmental organizations (NGOs). Taken together, the

[95] Pitou van Dijck and Gerrit Faber, *Developing Countries and the Doha Development Agenda of the WTO* (1st edn, Routledge 2006) 3

[96] Pitou van Dijck and Gerrit Faber, *Developing Countries and the Doha Development Agenda of the WTO* (1st edn, Routledge 2006) 3

[97] Pitou van Dijck and Gerrit Faber, *Developing Countries and the Doha Development Agenda of the WTO* (1st edn, Routledge 2006) 5

[98] Pitou van Dijck and Gerrit Faber, *Developing Countries and the Doha Development Agenda of the WTO* (1st edn, Routledge 2006) 5

increased complexity of substance, expanded membership, and increased openness all contribute to the complexity of consensus making in a 'single undertaking'. Although the time for secret deals among the big players may be past, reaching an agreement among so many partners in dialogue with the outside world will be an even more arduous task than ever before.[99]

There was a standstill in progress during the Cancun negotiations. While the Doha Round running into the sand in Cancún is a setback to the global trading system, it would be wrong to conclude that this failure would undermine the legal and organizational foundations of the world trading system embodied in the WTO. The flip-side of this coin is that following Cancún, the penchant towards bilateral trade agreements among WTO members increased.[100]

The greatest disagreement between the developed and developing countries was concerning two areas. The causae causantes of the setback in Cancún were disagreements and conflicting positions among the 146 participating members of the WTO, which were divided into four main negotiating blocs: the US, the European Union (EU), the so-called Group-of-Twenty-One (G-21) developing economies and the Group-of-Ninety (G-90) which included small and low-income developing economies and the least-developed countries (LDCs). The disagreements were principally in two areas of international trade, agriculture, which is an age-old chestnut, and the so-called Singapore issues.[101]

The setback in Cancun was triggered by the disagreement about Singapore issues and it threatened to create a greater gap between the developing and developed countries. As ministers could not agree in Cancún on the negotiating framework and future agenda, the future of many relevant issues of negotiations seemed uncertain. A valid apprehension was that the Cancún setback was not only likely to make the round lose its momentum, but also bring it to a grinding halt. For these reasons, the outcome of the Fifth Ministerial Conference became a disappointment to the global trading community. In the end the participating trade ministers could not summon the necessary flexibility, adaptability, accommodation and political will to bridge the gaps that separated their respective positions. They could not agree in Cancún inter alia on whether to launch negotiations on the four Singapore issues, namely, (i) trade and foreign investment, (ii) trade and competition, (iii) transparency in government procurement and (iv) trade facilitation. Developing economies felt that the Singapore issues were primarily going to further the interests of the industrial economies in the multilateral trading system, which was not entirely correct because the fourth Singapore issue was going to benefit all WTO members.[102]

As Singapore issues were important to the developing and developed countries, some of them wanted to start negotiations as soon as possible. The level of political sensitivity varied widely on the Singapore issues, which caused serious disagreements among members. The EU – the principal demandeur – and within it the United Kingdom (UK), insisted that the decision to launch negotiations on the Singapore issues was taken in Doha, but the G-21 and other developing economies were of the view that this was not the agreement.[103]

The International market changed and the developing countries became the users and developers of high-technology. It was well-recognized in Doha that developing economies required improved access to technologies and markets – which means expansion in their trade – for underpinning their growth endeavours. To be sure, world trade has grown and developing countries have not been excluded from it. One far-reaching consequence of liberalization of tariff and non-tariff barriers

[99] Pitou van Dijck and Gerrit Faber, *Developing Countries and the Doha Development Agenda of the WTO* (1st edn, Routledge 2006) 5

[100] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 54-55

[101] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 56

[102] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 56-57

[103] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 57

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(NTBs) by developing economies since the mid-1980s has been an increase in their competitiveness in the global marketplace, leading to a larger volume of their exports. Others have succeeded in exporting high-technology products, particularly electronics goods, computer components, semiconductors, IC chips and various information-technology (IT)-related products.[104]

Since the Doha Round was about the developing countries, they came well prepared and organized. The developing economies were active participants in the Doha process and their preparations for negotiating on modalities and targets in Cancún were of a reasonably high level. Several events happened for the first time in Cancún. The developing economies coordinated better among themselves and there were far less divisions in the stands taken by them than ever in the past.[105]

The new organization of the most advanced and economically strongest developing countries gave them a strong leverage in trade negotiations. The initiative to form a robust G-21 was taken by Brazil, China, India and South Africa before the Fifth Ministerial Conference started, and the four provided collegial leadership. Twenty members of this group had joined hands during the pre-Cancún period, while two more joined during the Conference. G-21 became a voice to reckon with in Cancún. This group represented half the world's population and two-thirds of its farmers; it also conducted itself in a well-organized and professional manner (The Economist, 2003). For negotiations in agriculture and the Singapore issues, developing countries coalesced into ad hoc coalitions.[106]

There were many controversies concerning Cancun negotiations, especially the Singapore issues. Different causal factors emerged from the press reports, including inapt chairmanship of the Ministerial Conference by Luis Ernesto Derbez, the Foreign Minister of Mexico. Some believed that the agenda for Cancún was 'overloaded', making it difficult for many WTO members to simultaneously negotiate issues before or during the Ministerial Conference. The last day of the Fifth Ministerial Conference was entirely devoted to the Singapore issues. Different sub-groups of developing economies, including the members of the African, Caribbean and Pacific (ACP) countries, the G-90 and the members of the African Union (AU) came to Cancún with a well-defined position of not supporting the launch of negotiations on the four Singapore issues. The G-21 took a defensive and intransigent position on the Singapore issues. The principal proponents of the Singapore issues were the EU, Japan and Korea. In the EU, opinion on this issue was again divided. In several large EU economies, many firms did not support a strong EU stand on the Singapore issues.[107]

In order to settle the issues, the WTO Secretariat produced the Derbez Text. On 13 September, in Cancún, the Derbez Text was tabled by the WTO secretariat. Although prepared by the WTO secretariat, it was officially christened the Derbez Text in honour of Louis Ernest Derbez, the Foreign Minister of Mexico, who chaired the Fifth Ministerial Conference (WTO, 2003b). Tariff reductions for improving market access were larger in the Derbez Text than in the Uruguay Round Agreement on Agriculture (URAA). It also proposed to address the tariff peaks as well as devise a formula to rein in tariff escalation. In addition, a principle of a special safeguard mechanism was also accepted by the industrial economies. After the Cancún failure, the issue of export subsidies was no longer untouchable, and the OECD economies that were regarded as highly protectionist and middle-of-the-road were willing to discuss it in a flexible manner. In addition, larger reductions in trade-distorting domestic subsidies were under consideration for the first time, which included the amber box and de minimis payments. As demanded by the G-21 economies, a capping of the blue-box payments was also on the cards.[108]

[104] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 60

[105] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 63

[106] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 64

[107] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 74

[108] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 81

In the hope of rescuing the Doha Round after the Cancún failure, the WTO hosted a meeting of the General Council to negotiate a broad framework agreement for the future MTNs in the last week of July 2004. The initiative to formulate, negotiate and finally come. to the so-called 'July Package' – also referred to as the framework agreement – was taken by Australia, Brazil, the EU, India and the USA. After intense all-night negotiations a broad framework agreement was reached in principle, albeit a small number of finer details were left for the future negotiating sessions. The July Package is a non-binding frameworks agreement, which succeeded in reviving the stalemated MTNs. As it was negotiated in Geneva, it is also called the Geneva agreement.[109] The July Package text in this regard is a carry over from the Derbez Text, which was strongly opposed in Cancún by all the groups among the developing economies. In turn, they had proposed a non-linear formula for tariff reductions, /sectoral negotiations and weak special and differential treatment.[110]

Consideration for developing countries needs and their further inclusion in International trade

Although the WTO provides special treatment for the developing countries, it prescribes a proposition for a country to be a precleared developing country. The WTO does not have a definition of developing economies, although some supranational institutions, like the World Bank, not only provide a closely worded definition, but also of their various sub-groups. A WTO member decides and declares its status itself. Over the years, the traditional approach of the developing economies has been to seek benefits under special and differential treatment (SDT). The term SDT captures the WTO provisions that grant preferential access to markets to certain subsets of developing economies and gives them exemptions from certain rules, or gives them extra time to comply.[111]

To maximize the benefits of WTO membership, developing economies sought to expand the reach of SDT, whose benefits span three important areas, namely, (i) preferential access to the industrial economies' markets without reciprocation, (ii) exemption from some WTO obligations, many of which are transitory and some permanent and (iii) technical assistance and help in institution-building so that WTO obligations can be fulfilled and negotiated and decisions implemented.[112]

The SDT is a system of preferences, which by definition are discriminatory. Theoretically the concept of SDT is unarguably noble, but in reality it did not generate substantial benefits to the developing economies. There were several causes behind this failure. The preferential market access schedules under SDT were designed voluntarily by the industrial economies, which chose the eligible countries and products for their schedules. It was observed that, first, the selected countries and products generally lacked capacity to export and, secondly, countries and products with export potential were excluded from the schedules.[113] The SDT has operated for small, low-income developing economies for many decades. Although there have been a good number of recipients of SDT's benefits, not all of them have in practice benefited from it. The foremost group to benefit from SDT was a small sub-set of the relatively more advanced developing economies.[114]

In the Doha Round it was recognized that it was of paramount importance to include the SDT in the international trade. What is more, the SDT were given adequate channels through which they could prosper. The Doha Development Agenda (DDA) again reaffirmed the importance to the SDT for the

[109] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 81-82

[110] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 83

[111] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 93

[112] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 94

[113] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 94

[114] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 95

multilateral trade regime and referred to it as an integral part of the WTO agreement' in the Doha Communiqué. Recognizing that SDT has not imparted a lot of benefits to the target group of beneficiaries, in paragraph 44 participating members called for a review of the SDT schedules so that their provisions can be strengthened 'making them more precise, effective and operational' so that it is able to fulfil its objectives (WTO, 2001). As noted above, the benefits of SDT are provided through three different channels. A good case exists for rethinking all of the three channels so that the benefits can be targeted more precisely for the target groups that need them most. In paragraph 14, the Doha Communiqué provided a deadline for reestablishing the new modalities of the SDT; the deliberations and dialogues on this issue continued all through 2002, but without a consensus or decision.[115]

The policy-makers were not satisfied with the effects of the SDT. In order to change that, they presented a new proposal that affected the developed and developing countries. In view of the fact that the SDT did not spawn large benefits for the target groups, academics and policy-makers have debated over what shape the SDT should take in future so that it is able to meet the expected goals. There is some degree of agreement among researchers on the new shape of STD and their comprehensive recommendations are summarized as follows: industrial economies need to slash all MFN tariffs on labour intensive exports from the developing economies, eveloping economies on their part should reduce their tariff barriers on the basis of the adopted formula approach, industrial economies should make binding commitments in trade in services to expand temporary excess of services providers by a specific amount, say 1 per cent of the workforce, feasible channels of meeting the special institutional development needs of small developing economies and LDCs should be replace, there are some WTO agreements that are required to be adopted in such a manner that they become supportive of development.[116]

In order for S&D program to have a full effect, it has to be properly incorporated. Flexibility in the approach to each developing country is crucial. While it is difficult to quantify the gains from the S&D work programme, mainly because of the lag between adopting and operationalizing any recommendation, it can be said that gains would accrue by making the S&D provisions more precise, effective and binding. Clearly, in order to assist developing countries, especially the LDCs, the S&D provisions must respond to, and be reflective of, their concerns. A number of developing country Members have said that commitments and obligations undertaken by them in the WTO have reduced their flexibility to adopt, what in their view, are pro-development policies and measures. In this context, they have put forward a number of proposals which seek to enhance the existing flexibility in the rules for them, and consequently provide them a certain degree of policy space. They have also sought simplification of cumbersome procedures and/or notification obligations, so that they can divert their resources to other developmental issues and areas.[117]

The time for the application of the measures is crucial in the transition period. Moreover, it represents a problem for the developing countries, because they do not have enough technical knowledge to apply the arrangements properly in due time. Developing country Members also consider transitional time periods as an important element of S&D treatment; one that provides them with more time to conform with, or fulfil particular obligations. However, many, if not all, of these transition periods have expired and developing countries, especially the LDCs, are seeking a positive consideration of their requests for extension of these transition periods. There are several proposals on the need for technical assistance to be more predictable and targeted to the development needs of developing

[115] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 96-97

[116] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 98-99

[117] WTO Secretariat, Developmental aspects of the Doha Round of negotiations in Harald Hohmann (ed), *Agreeing and Implementing the Doha Round of the WTO* (Cambridge University Press 2008) 68

countries and LDCs. There are also a number of proposals that seek to improve coherence arrangements with other organizations in the delivery of such assistance.[118]

During the round, two major questions were recognized; the difference in trade policies that depended on the economic strength of the countries and the agricultural sector. The Doha Ministerial Communication pragmatically recognized that appropriate trade policies for developing and industrial economies differ substantially, and trade ministers participating in the Doha Ministerial Conference expected that any future trade agreement should take full account of this fact. Agriculture is a make-or-break issue of the Doha Round of MTNs. Paragraphs 13 and 14 of the Doha Ministerial declaration reconfirm the long-term objective already agreed in the present WTO Agreement, that is to establish a fair and market-oriented multilateral trading system through a programme of fundamental reform of agricultural trade (WTO, 2001).[119]

The important innovation was the change in stance towards the agricultural policy. It encompassed strengthened WTO rules and specific commitments on elimination of domestic support to agriculture by governments. It aimed for an end of protection for agriculture. The ultimate purpose was to correct and prevent the myriad restrictions and countless distortions in world agricultural markets. During the Doha Round, 'without prejudging the outcome', the member governments committed themselves to comprehensive negotiations aimed at

1 substantial reductions in barriers to market access;

2 reductions of exports subsidies with a view to phasing them out; and

3 substantial reductions in domestic support that distorts trade.[120]

Through new areas of negotiation, the LDC was more included in the international trade. An innovation of the Doha Ministerial was that it made special and differential treatment (SDT) for developing countries integral throughout the negotiations. SDT applies to both new commitments made by the member economies, and to any relevant new or revised rules and disciplines initiated during the Doha Round. The SDT requires that the outcome of negotiations should be effective in practice and should enable developing countries, in particular the LDCs, to meet their needs.[121]

Members also agreed to the need of further clarifying the 'blended formula approach' to market-access commitments, which needed to be done with reference to the concerns of the developing economies. This approach was proposed in the joint text prepared by the EU and the USA. It divided tariff cuts into three categories. In the first, known as the Uruguay Round 'formula', weak cuts on a select number of high tariffs were made for sensitive products with an average and minimum reduction. It involved quota increases for these products. The second set of tariff cuts involved a more ambitious approach with reductions based on the 'Swiss formula', which meant deeper cuts on a broader category of less-sensitive products. The third part of the blended formula approach was trimming down some tariff lines to zero.[122]

Members sought commitment to reductions or elimination of all forms of unfair export competition with the view that a 'commitment to the elimination of all forms of export subsidies is a must for these negotiations to be successful'. There was general acceptance of the concepts of 'Special Products' and the special safeguard mechanism for the developing countries. As the foregoing discussion shows, export subsidies have been an extremely problematic aspect of trade in agriculture,

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[118] WTO Secretariat, Developmental aspects of the Doha Round of negotiations in Harald Hohmann (ed), *Agreeing and Implementing the Doha Round of the WTO* (Cambridge University Press 2008) 68

[119] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 159

[120] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 159

[121] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 159-160

[122] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 164

and therefore were assigned an important place in the negotiations. Success on this front would represent an enormous achievement for the Doha Round. To be sure, in 2004 export subsidies were less than what they were a decade ago when the Uruguay Round ended, but they still distort many commodity markets and are a source of unpredictability for producers.[123]

Objectives and partial modalities have been established in this agreement, and the basis for the negotiations of full modalities is to be taken up in the next phase of negotiations. As in the Doha Development Agenda (DDA), it was again agreed in the framework agreement that as agriculture is a critically important sector for the developing economies, the modalities to be developed would need to incorporate operationally effective provisions for SDT. Also, the developing economies must be able to pursue agricultural policies that are supportive of their development goals as well as poverty alleviation. The framework agreement clearly noted that the 'reforms in all three pillars form an interconnected whole and must be approached in a balanced and equitable manner' (WTO, 2004b).[124]

The subsidies represented an obstacle to free trade and this was discussed at the Doha Round. As the Doha Ministerial Declaration calls for 'reduction of, with a view to phasing out, all forms of export subsidies', WTO members have agreed to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date. The Doha Ministerial Declaration also calls for 'substantial improvements in market access'. Members also agreed that special and differential treatment for developing members would be an integral part of all elements in the negotiations. Tariff reductions will be made from bound rates.[125]

It can be said that all the Members will profit from Doha negotiations in a certain matter. While the benefits from further agriculture reform will differ between Members depending on each Member's production and trade mix, it can generally be said that a successful conclusion of the negotiations would lead to considerable gains for developing countries. Further reform of the world agriculture trading system would lead Members closer towards the long-term objective they agreed to during the Uruguay Round, namely to establish a fair and market-oriented agricultural trading system.[126]

In order to promote international trade, the tariff reduction was necessary. With the tariff reduction, new markets opened for the developed and the developing countries. Substantial reductions of tariffs, along with a reduction of tariff peaks and tariff escalation, would result in increased market access opportunities. Developed countries will be required to reduce their bound tariffs by at least 54 per cent on average, while developing countries' maximum average reduction will be 36 per cent. With the gap between bound and applied tariffs generally low in developed country markets, developing countries should witness the development of new market access opportunities to developed countries. Although developed countries (and developing countries) are able to shield some tariff lines from the full tariff formula cuts, where such flexibility is used, new market access opportunities via tariff quotas will have to be provided. Thus new specific market access opportunities will exist for even the most sensitive of products.[127]

The WTO found that the diseases that affected poor countries were on an alarming level. During the Doha Round this problem was taken into consideration. Many developing economies, particularly the low-income ones and the LDCs, face serious and frequent outbreaks of epidemics and public health disasters. For example, according to WHO estimates, in the early years of the twenty-first century, 3

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[123] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 164

[124] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 165

[125] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 167

[126] World Trade Organization, 'DEVELOPMENTAL ASPECTS OF THE DOHA ROUND OF NEGOTIATIONS' (*www.wto.org*, 28 October 2010) <https://docs.wto.org> accessed 18 February 2018

[127] World Trade Organization, 'DEVELOPMENTAL ASPECTS OF THE DOHA ROUND OF NEGOTIATIONS' (*www.wto.org*, 28 October 2010) <https://docs.wto.org> accessed 18 February 2018

million people died of human immune virus/ acquired immune deficiency syndrome (HIV/AIDS) annually, with 2.3 million in only one region, sub-Saharan Africa. Mortality from malaria was estimated at 1 million per year and tuberculosis 2 million. Therefore, at the time of the launch of the Doha Round, the issue of access to generic drugs and essential medicines in developing countries was assigned a great deal of significance by the participating trade ministers.[128]

The long-simmering controversy between the industrial and developing countries regarding this issue was a consequence of two conflicting needs: the need to ensure accessibility to essential medicines in developing countries on the one hand, and the interest of the pharmaceutical companies in the industrial countries to profit from manufacturing and selling such medicines after years of investment in research and expensive licensing procedures, on the other hand. The two contending sides took logical and self-righteous stands, and neither could be easily flawed in its position. The pharmaceutical companies that invest in research and development (R&D) and invent and manufacture medicines expect to be rewarded for promoting R&D in new medicines. To be sure, there is public interest in encouraging them in making this investment, which is also one of the fundamental rationales of the IPRs and patent law. On their part, the developing economies need the life-saving generic drugs, especially during periods of epidemics and medical disasters when these drugs are required at short notice.[129]

The WTO took a humanitarian point of view and fomented the interpretation of the TRIPS Agreement in a way that would benefit the developing countries. Namely, the declarations encouraged flexibility in the interpretations of the TRIPS Agreement and brought up to surface the pharmaceutical problems that the developing countries Members had. The 'Declaration on the TRIPS Agreement and Public Health' by WTO members, in Paragraph 4, encouraged 'flexibility' in interpreting the TRIPS agreement in such a way that it reflects the interests of member states and allows them to protect public health in general, and promote the access of populations in developing countries to essential generic drugs specifically. It is further pointed out in Paragraph 5 that the flexibility should be specifically adopted in the area of compulsory licensing of life-saving generic drugs and exhaustion of the intellectual property rights. Paragraph 6 recognized and drew attention to the difficulties of WTO members that did not have sufficient manufacturing capability in their pharmaceutical sector, or did not have a pharmaceutical industry at all. These countries cannot make effective use of the system of compulsory licences under the TRIPS agreement. Therefore, Paragraph 6 instructed the Council for TRIPS 'to find an expeditious solution to this problem and to report to the General Council before the end of 2002'.[130]

In the Fourth Session of the Doha Ministerial Conference the negotiators were charged by the DDA with resolving the issue of TRIPS vis-à-vis public health emergencies. As noted earlier, many developing countries, including LDCs, face potential public health crises in the areas of HIV/AIDS, tuberculosis, malaria or similar epidemics that call for urgent medical treatment. Against the backdrop of these distressful situations faced by several WTO members, an expeditious resolution of this issue was needed.[131]

Despite the disagreements in patent exemption, the Members came to recognition that under some conditions developing countries can import generic drugs. Discussions over patent exemptions reached a total impasse at the end of 2002, although members were eager to reach some sort of agreement before the start of the Fifth Ministerial Conference in Cancún. After long deliberations and negotiations, this vitally important issue was eventually resolved on 30 August 2003. Members agreed to adopt the 'Decision of the TRIPS Agreement and Public Health', which allowed developing

[128] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 188

[129] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 188-189

[130] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 189

[131] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 189-190

economies greater access to needed categories of vital medicines when their governments are faced with outbreak of diseases that threaten public health (WTO, 2003). This decision allows developing countries to import generic drugs for the treatment of diseases that are public-health threats, and has far-reaching ramifications for those developing countries and LDCs that do not have a pharmaceutical industry, or where it is in its infancy.[132]

The strategy was made in order to avoid abuses in medicine distribution and this was something that all the countries agreed upon. An implementation procedure in which countries that have manufacturing capacities can acquire permission to export medicines that are manufactured in accordance with a compulsory licence, while providing proper guarantees that the export destination will be limited to member states that lack such manufacturing capacity and face a public-health crisis, and guaranteeing that the exported medicines will not be transferred to third countries, was created to meet the expectations of all countries. Developing countries were satisfied that the agreement did not limit them to emergency situations or designate only a short list of diseases for which generic drugs could be produced. Instead, it permitted them to produce or import drugs to address the particular diseases that affected their countries.[133]

The agreement permitted eligible WTO members to obtain from an eligible exporting WTO member, which had the manufacturing capabilities in the vital drugs, pharmaceutical supplies to meet a public health emergency. LDC members could automatically avail themselves of this pharmaceutical import system, although other developing countries were required to notify the Council for TRIPS regarding the public health emergency, or 'circumstances of extreme urgency that required a patented medicine for public, noncommercial use'. The importing developing country is also required to notify the Council for TRIPS the name and quantity of the patented medicine required. Under the 'Decision of 30 August 2003' it is also expected to notify of its inadequate manufacturing capability and ask for a compulsory license under TRIPS Article XXXI for a patented pharmaceutical product (WTO, 2003). Several well-conceived measures have been devised to monitor the exporting firm and country. The exporting WTO member is issued a compulsory licence, and the amount of pharmaceuticals manufactured under the licence should be what is required to meet the emergency needs of the importing member.[134]

The persistency in the Doha Declaration to improve public health was on a remarkable level. In the Doha Declaration, participating trade ministers stressed that it is important to implement and interpret the TRIPS agreement in such a way that supports public health –by promoting both access to existing medicines and the creation of new medicines. They stated that the TRIPS should be supportive of public health by promoting both access to existing medicines and research and development into new medicines. It is not a surprise that the DDA also calls on industrial economies to find ways to facilitate technology transfer to the developing economies, in particular to the LDCs.[135]

[132] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 190

[133] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 190

[134] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 192

[135] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 192

Trade ministers made a great effort in order to give opportunity to poor countries to have a better health care and adapt the TRIPS Agreement in order to make this possible. Many developing economies, particularly the low-income ones and LDCs, face serious health problems. Therefore, at the time of the launch of the Doha Round, the issue of access to essential medicines in developing countries was assigned a great deal of significance by the participating trade ministers. Given the importance of this issue, they had made a separate 'Declaration on TRIPS Agreement and Public Health', which obviously reflected their concern regarding the TRIPS agreement becoming a roadblock in the matters related to public health.[136]

[136] Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* (1st edn, Palgrave Macmillan 2005) 192 193

Chapter Four

Us- Shrimp Case

The US wanted to protect sea turtles from extinction. Several species of sea turtles are endangered. In the 1980s, in an effort to protect these species, the United States enacted measures to reduce the number of sea turtles killed by US trawlers. The most important measure was a requirement that every US trawler fishing waters inhabited by sea turtles be equipped with a Turtle Excluder Device.[137] In 1989, the United States attempted to impose the Turtle Excluder Device requirement on shrimp trawlers elsewhere in the world.[138]

In order to protect endangered turtles the US law provided few conditions. Namely, there was the proclamation of the obligation of the US State Department to promote this case through negotiation, and monitor the protection of sea turtles. The Section 609 of the law on the "Protection of sea turtles in shrimp trawl fishing operations" contained several elements. First, it required the US State Department to (1) commence negotiations as soon as possible for concluding bilateral and multilateral agreements to protect sea turtles and to (2) promote other international environmental agreements to better protect sea turtles. Second, it required the State Department to report to Congress within a year on the practices of other countries affecting the mortality of sea turtles. Third, it prohibited the importation of any shrimp harvested using commercial fishing technologies that might harm sea turtles, unless the exporting country is certified by the US administration as having a regulatory program to prevent incidental turtle deaths comparable to that of the United States, or is certified as having a fishing environment that does not pose risks to sea turtles from shrimping.[139]

At first the section 609 was applied only regionally. However, the NGOs involved and requested that section 609 should not be applied only on one area. Until 1995, the State Department had only applied the requirements of this section to the Caribbean area and did so on the basis of a program to require trawlers to be equipped with Turtle Excluder Devices. In 1995, environmental NGOs challenged the decision of the State Department to limit the application of section 609 to the Caribbean area before the US Court of International Trade.[140]

While the State Department had the intention to prolong the deadline for the application of embargo, The Court of International Trade held the other opinion. The Court of International Trade held that there was no statutory basis for limiting the law to the Caribbean region. In a subsequent court action, the State Department asked the court to extend the deadline for application of the embargo to other countries beyond 1996, arguing that this deadline would provide inadequate opportunity for other countries to adopt the measures necessary to be certified. The Court of International Trade denied this request.[141]

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[137] TED are metal or mesh grind that were placed in shrimps nets to keep the larger objects from becoming ensnared

[138] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 41-42

[139] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 42

[140] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 42

[141] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 42

The Court evaluated that the intention of Congress was to apply the provisions of section 609 with regard to the place of origin, not the use of Turtle Devise technology. The Court held that Congress had intended that the main operative provision of section 609, which banned shrimps caught with commercial fishing technology harmful to endangered species of sea turtles, in fact applied to all shrimps not originating from certified countries, regardless of whether the imported shrimps themselves were caught by boats equipped with Turtle Excluder Device technology.[142]

On the day of the Court of International Trade judgment, India, Malaysia, Pakistan, and Thailand took the matter to dispute settlement at the WTO. The United States chose not to dispute explicitly the complainants' argument that the shrimp embargo was a violation of Article XI GATT, which bans non-tariff prohibitions or restrictions on imports. The United States based its defense of the measure strictly on the claim that they were justified under Article XX.b or g GATT. Article XX GATT provides exceptions (to Article XI GATT) for measures that are "necessary" to protect human and animal health (XX.b) and measures enacted "in relation to" the conservation of natural resources (XX.g).[143]

The Panel decides to put emphasis is the embargo legitimate in context of preamble of Article XX GATT. While much of the legal arguments of the parties, as well as their factual claims, addressed whether the embargo could be justified under Article XX.b or g GATT, the Panel chose to pin its legal analysis exclusively on a consideration of whether the embargo satisfied the chapeau, i.e. the general provisions of Article XX GATT. It stipulated that measures should not be applied" in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction of international trade."[144]

Multilateral trade framework is not possible if one Member conducts unilateral decisions that are not in line with the preamble of the GATT. That would lead to the confusion and conflicts in the WTO Organization. The Panel ruled that unilateral measures conditioning market access to the adoption of certain policies by exporting countries were not consistent with the chapeau. According to the Panel, if such unilateral measures were accepted, the WTO agreement could "no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those Agreements would be threatened. This follows because if one WTO Member were allowed such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, policy requirements for the same product and being refused access to these other markets.[145]

[142] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 43

[143] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 43

[144] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 43

[145] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 43-44

The United States were not satisfied with this decision. The United States appealed this ruling. The AB reversed the findings of the Panel on two important issues. Importantly, the AB also went forward to apply the law, as correctly understood, to the facts of the case.[146]

The Appellate Body had a different view on the interpretation of the Article XX GATT. First, the AB found that the Panel had made an error of law in assuming that unilateral measures that condition market access on the policies of exporting countries were, as a matter of principle, not justifiable under Article XX GATT.[147]

While the Panel explication was that the United States measures are excluded, the Appellate Body found these measures to be within the scope of the exceptions to the Article XX GATT. In particular, paragraph 121 reads:

In the present case, the Panel found that the United States measures at stake fell within the class of excluded measures because section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning market access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling with the scope of one or another of the exceptions (a) to (j) of Article XX.[148]

The Appellate Body had a different approach. The meaning of chapeau or preamble of the GATT has given more comprehensive look by the AB. Second, the AB found that the Panel should have applied a sequential approach in dealing with Article XX GATT, such that it should have first considered whether the measure could be justified under one of the heads of Article XX GATT and then only if there was such provisional justification, to consider whether the party maintaining the measure was in compliance with the chapeau. The AB stressed that the chapeau Is concerned only with the application of measures, not whether the measures themselves are justified under Article XX GATT.[149]

According to the AB (paragraph 15), In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are applied.[150]

During the research, the AB considered if measures could be correlated with the special heads of the Article XX GATT. The AB connected the GATT articles with the measures in order to discover if the measures correlated with the GATT standards. The AB went on to complete the sequential analysis. The first stage involved the question whether the measure was covered by any of the specific heads of Article XX GATT. The AB considered that turtles could be seen as an exhaustible resource within the

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[146] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 44

[147] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 44

[148] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 44

[149] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 44-45

[150] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 45

meaning of Article XX.g GATT and further analyzed whether the measure was "in relation" with its conservation. In doing so, the AB applied a "rational connection" or reasonableness standard and easily found that the measure met this standard.[151]

The AB findings were in favor of the US law. What is more, there was proportionality with the scope of protection of turtle species. Thus, the AB not only held that there was a direct connection between the main features of the US scheme and the conservation of sea turtles, but also found that "section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.[152]

The scopes of the environmental and turtles conservation benefits were not put in the equation with the trade benefits. What the AB appears to mean here by proportionality in scope and reach, is whether all the trade-restricting features of the scheme have some reasonable connection to turtle conservation. It does not appear to be balancing in any way the environmental benefits against the costs to trade entailed in the measure. Thus, the AB does not engage in the analysis of the trade-off between the benefits of the measure in terms of environmental protection and its costs in terms of trade restrictions.[153]

Although section 609 provided the obligation for the State Department to negotiate with the countries, the State Department neglected this obligation and committed discrimination. What is more, with this discrimination the US did not take conditions in other countries into consideration. With respect to the second stage (whether the implementation of the measure met the conditions of the chapeau), the AB found that the failure of the State Department to negotiate seriously with the complainants constituted "unjustifiable discrimination." This was a failure in implementation since section 609 itself contained a requirement to negotiate with all relevant countries. In addition, the AB found that the implementation involved unjustifiable discrimination because (i) the Panel were applying a rigid, extraterritorial extension of US law to other countries and because (ii) the Panel wholly disregarded the conditions prevailing in other countries.[154]

The AB found that it was inappropriate to request the measures that the US have for other countries, because exporting countries could achieve the same goals with more acceptable solutions. To be certified and hence gain access to the US markets, all countries were required to have a Turtle Excluder Device program essentially identical to that of the US, regardless of the conditions prevailing in those countries. It was unjustified because, as the AB suggests, other measures more acceptable to the exporting country might have achieved the legitimate conservation objective of the US. Section 609 itself allowed for the possibility of certification in the case of a turtle conservation program comparable to that of the US.[155]

The US changed the conditions for the certification if the program without the devices was effective. Furthermore, the US included fishing conditions in exporting countries. Following the AB ruling, the

[151] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 45

[152] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 45

[153] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 45

[154] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 45-46

[155] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 46

US modified the guidelines implementing section 609. The revised guidelines dropped the requirement that exporting countries should use Turtle Excluder Devices and allowed for certification if the exporting countries could show that they were enforcing a regulatory program without devices that was comparable in effectiveness to those using devices. The revised guidelines also allowed for certification if fishing conditions in the exporting country did not pose a threat of incidental capture of sea turtles. Finally, the revised guidelines allowed for shipment by shipment certification, and greater transparency and due process.[156]

The Article 21.5 of the DSU provides that: 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 resort to the original panel.[157]

Malaysia was not content with the decision. Of the complainants in the original action, Malaysia alone filed a complaint under 21.5, alleging that the changes that the United States made in the manner of implementation of section 609 did not satisfy the conditions of the chapeau as articulated by the AB.[158]

Under the Panel findings, the US measure was in compliance with the obligation under chapeau. The Panel found that, in all relevant respects, the United States had met its obligations under the chapeau and that its measure was now in conformity with the requirements of the GATT treaty. The core of the Panel's decision related to its interpretation of the kind of "flexibility" that the AB was requiring in order for the United States to meet the requirements of the chapeau; this core aspect was the basis of Malaysia's further appeal of the 21.5 Panel ruling to the AB.[159]

The AB is limited by the articles of the Covered Agreement and they must be specified. It has been repeatedly held by the AB that a panel may only consider claims based on articles of the Covered Agreements that are listed in the request for a panel. The minimum level of specificity at which these must be listed is the article itself; however, a greater degree of specificity may be required where necessary for the defending party to be fully apprised of the case against it.[160]

When Malaysia requested a Panel, it did not rely on any articles of the covered agreements. In Malaysia's request for a 21.5 Panel, Malaysia did not cite any articles of the covered agreements with which it was claiming the new US measures were inconsistent (Recourse by Malaysia to Article 21.5 DSU, WT/DS58/17).[161]

Under the Article 6.2 of the DSU it is provided that: The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem

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[156] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 46-47

[157] Article 21.5, DSU

[158] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 47

[159] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 47

[160] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 47

[161] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 47

clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.[162]

Within this provision, the Panel jurisdiction is based on the claim for the Panel. The request for a panel is a crucial element in the establishment of the panel's jurisdiction (European Communities–Bananas III, Report of the Appellate Body, adopted September 25, 1997, WT/DS27/AB/R, paragraph.141), and the Panel erred in assuming that it possessed jurisdiction without determining the adequacy of the request for the panel in light of DSU 6.2.[163]

The Panel made an error in the interpretation rights of the defending party. The Panel's justification for so proceeding was that the United States did not claim that the request for the Panel was inadequately specific. However, the minimum requirement that the articles of the DSU upon which a member is relying be stated in its request for a panel is not one that can be waived by the defending party.[164]

The Panel request is something that concerns all the WTO Members. A request for a panel alerts all WTO members to the substance of the complaining Member's claim and may affect their decision as to whether to seek third-party rights in a given proceeding.[165]

Besides the Articles of a Covered Agreement, the complaining Party can call upon other provisions of the Covered Agreement if they are incorporated by reference. To be sure, by listing an article of a covered agreement in its request for a panel, and claiming this article to have been violated, a complaining Party may be able to make a claim concerning other provisions of the covered agreements, where these other, unlisted, provisions are incorporated by reference, as it were, through the listed articles.[166]

Unless otherwise so specified, or unless such an interpretation would be manifestly absurd or unreasonable, provisions of the DSU that apply to a panel apply, mutatis mutandis, with respect to a 21.5 panel: the term "panel" is an expression with a special meaning within the DSU, and, applying Article 31.4 of the Vienna Convention, this special meaning as defined in numerous provisions of the DSU should be given to its usage within 21.5 except where the treaty text itself modifies that meaning in the case of 21.5 panels (for example, time limitations).[167]

When AB conducted analysis, it concluded that the US scheme was dissimilarly applied to different countries. What is more, this led the AB to conclusion that there were the cases of discrimination. In completing the analysis in the original AB decision in this case, the AB identified several differences in the manner in which the US scheme was applied to different shrimp-exporting countries, which amounted "cumulatively" to unjustifiable discrimination within the meaning of the chapeau. One of

[162] Article 6.2 of the DSU

[163] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 47-48

[164] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 48

[165] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 48

[166] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 48

[167] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 48

the features in question that contributed to the existence of "unjustifiable discrimination "was" country-by-country application of the legislation."[168]

The Panel rightfully held the opinion that shipment-by-shipment certification, if wider picture of terms was taken into consideration in exporting countries, is not discrimination. In its report the 21.5 Panel correctly found that the United States' change to shipment-by-shipment certification was one respect in which its new measure could be considered not to contribute to the existence of "unjustifiable discrimination." However, the 21.5 Panel went further and held that "[t]his condition is addressed separately from the broader category concerning lack of flexibility and insufficient consideration of the conditions prevailing in the exporting countries because, in our opinion, it required a specific solution, while the other findings left more discretion to the United States".[169]

The AB report was unsupportable to the country-by-country scheme. What is more, it was difficult to classify it under non-discrimination. This treatment of country-by-country vs. shipment-by-shipment certification is unwarranted by anything in the AB report. The AB considered the country-by-country aspect of the scheme, in one of a series of continuous paragraphs in the section of its report under the heading" Unjustifiable Discrimination," in which it dealt with all the other aspects bearing on "unjustified discrimination" as well; the section as a whole ends in a single finding of unjustifiable discrimination in the ultimate paragraph, based upon the cumulation of the various aspects identified throughout the section.[170]

The AB held a different point of view than the Panel. The AB recommendations were precise; that the US must respect the provisions of the covered Agreement. Contrary to the implication of the Panel, the AB did not suggest that country-by-country certification required a "specific solution." Its recommendation, in paragraph 188 of its report, is the standard recommendation that the US bring itself into conformity with the provisions of the covered Agreement in question, and there is no suggestion of a "specific solution," nor any distinction drawn between, on the one hand, elements of discretion in the means taken by the US to implement the AB report and, on the other, actions that the AB believes must be taken by the US in order to bring itself into conformity.[171]

Although the revised section 609 is consistent with chapeau, the US has only temporary protection from the review under the Article 21.5 of the DSU. The future conduct of US can easily be contested. A ruling that US officials are currently applying section 609 in a manner consistent with the chapeau could hardly immunize future acts of US officials from review under 21.5. In this sense, all the rights in Article XX GATT are indeed provisional, as the continuing justifiability of the measure under this article depends on the ongoing application of the measure being consistent with the chapeau.[172]

The Panel put heavy burden on the US. All the US future negotiations were under surveillance and could be assessed by the Article 21.5 of the Panel. However, in making this point ,the 21.5 Panel went too far, in suggesting that, as a matter of law, the US in order to maintain its measures justified under

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[168] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 48-49

[169] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 49

[170] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 49

[171] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 49-50

[172] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 50

Article XX GATT, must never cease to make further serious good faith efforts to negotiate a multilateral agreement. Whether any particular shortfall or curtailment of negotiating efforts at a future point in time might constitute“ unjustifiable discrimination” within the meaning of the chapeau, would have to be assessed by a 21.5 panel at that point in time, in light of all the facts.[173]

This harsh obligation for the US might be a product of the wrong interpretation of the AB. Moreover, certain wording in this statement by the panel (“may only be accepted under Article XX...” [emphasis added]) suggests that the 21.5 Panel may have misunderstood the AB as reading a condition in to the chapeau of Article XX GATT that is not based on the treaty text, rather than simply interpreting and applying the words “discrimination” and “unjustifiable” in the particular facts of this dispute.[174]

Despite that preamble of the Article XX GATT, there was no obligation for the negotiations; the AB found that unilateralism could lead to discriminatory behavior. The chapeau of Article XX GATT does not contain a positive duty to negotiate, regardless of the unilateral character of the measures in question; however, the elements of unilateralism discussed by the Appellate Body, might well lead to discriminatory behavior in respect of negotiations crossing the threshold of unjustifiable discrimination. But this is a matter of applying, on a case-by-case basis, the text of the chapeau to the full factual record and legal context.[175]

Malaysia was not content with the decision and it appealed. Malaysia appealed on two grounds. Namely, the basis for these appeals was the compliance of the Panel decision with the GATT agreement. First, Malaysia claimed that the Panel did not properly fulfill its mandate. According to Malaysia, the Panel considered the consistency of the compliance measure implemented by the US with the recommendations of the AB in the original decision but should have considered whether the compliance measures were consistent with GATT’s agreement.[176]

Second, Malaysia disagreed with the Panel’s conclusion that the reformed guidelines are consistent with the chapeau of Article XX GATT, namely that they no longer constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[177]

The AB found that although the Panel had to review the compliance measures completely, it was bound by claims made by the parties. With respect to the first claim, the AB confirmed that the mandate of the Panel is to consider the compliance measure in its “totality” and indeed to consider the consistency of the compliance measures with respect to GATT’s agreement but that the task of the Panel is limited by the claims made by the parties. The AB thus concluded that it would be inappropriate to consider issues that have not been raised.[178]

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[173] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 50

[174] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 51

[175] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 51

[176] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 51

[177] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 51

[178] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 51-52

Despite the fact that the fulfillment of Section 609 is unlawful, the Section 609 is not. The AB emphasized that only the implementation of Section 609 had been considered unlawful by the original decision (i.e. did not benefit from the exception of Article XX GATT) and not section 609 itself. The AB found that the application of the original measure that denied the original measure the benefit of Article XX GATT were unrelated to the original measure itself. Accordingly, the AB concluded that the panel did not have to consider again the consistency of section 609 with GATT's agreement.[179]

Although the section 609 was revised, its meaning has not been changed. The AB agreed with the Panel's finding that the "revised guidelines do not modify the interpretation given to section 609" and that there is "no evidence" that the revised guidelines have modified in any way the meaning of section 609 vis` a-vis the requirements of paragraph (g), as interpreted by the AB.[180]

Malaysia objected because there had not been negotiations before the import prohibition and because unilateral decision led to discrimination. Malaysia claims that the revised guidelines still violate the chapeau of Article XX GATT on, essentially, two grounds. First, Malaysia claims that the US should have not only negotiated but also concluded an international agreement on the protection of sea turtles before imposing an import prohibition. Malaysia points out that if the requirement is only to negotiate, as long as the negotiation is not concluded, defendants could end up imposing unilateral measures which would constitute "unjustifiable" discrimination.[181]

The negotiation process is not practical to conclude an international agreement. The AB ruled that a requirement to conclude an international agreement would be unreasonable – essentially because it would grant a veto right to every single party to the negotiation on whether a country fulfills its WTO obligations.[182]

The Panel and the AB had different opinion about the interpretation of the chapeau flexibility requirement. Second, Malaysia challenged the panel's interpretation of the chapeau's flexibility requirement. As indicated above, the original AB decision found that the US could not require other countries to adopt its own regime of protection of sea turtles. According to the AB, this would constitute arbitrary discrimination.[183]

Malaysia held the opinion that the US has enough power to make an arbitrary decision that is not in accordance with the chapeau of Article XX GATT. The Compliance Panel found (relying on the original Ab decision) that a requirement that foreign programs should be comparable in effectiveness would be compatible with the chapeau of Article XX GATT and hence would not constitute arbitrary discrimination. Malaysia disagreed and noted that the US will retain the power to decide which programs can be considered as comparable in effectiveness. According to Malaysia, awarding a veto

[179] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 52

[180] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 52

[181] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 52

[182] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 52

[183] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 53

right to the US with respect to alternative programs implies that the US measure results in arbitrary or unjustifiable discrimination.[184]

For Malaysia, the ruling of the AB that approved unilateral policy of one country cannot be justified under the exceptions of the Article XX GATT. Malaysia further argued that the AB's ruling in the original case that "conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX," was mere dicta.[185]

There is a big difference between the identical measures and the imposition of measures that are comparable in effectiveness and thus the AB resolved that there is not "mere dicta" situation in this case. The AB emphasized that the principle expressed by this statement was not mere dicta, but rather a principle that was "central" to its ruling. The AB further amplified the distinction between the imposition of identical measures and the imposition of measures that are comparable in effectiveness. The AB emphasized that the latter gives sufficient latitude to the exporting countries to adjust to the specific conditions that they face (paragraph 144).[186]

This ruling is of significant importance. It affected the outlook and introduced new standards with regard to the environmental issues. What is more, it changed the Panel access to Article XX GATT. The AB 21.5 ruling raises at least two important issues. First, the AB compliance ruling, has confirmed, definitively, that imports can be made contingent on environmental standards that are determined unilaterally by the importing nation. The importance of this final determination should not be underestimated. It effectively reverses the initial Panel ruling but also stands in stark contrast with the general approach adopted by panels in other cases where environmental measures were at stake. For instance, in both Tuna/Dolphin cases, the Panel had ruled that an embargo on tuna which was not fished in a dolphin friendly manner, could not be justified under Article XX.[187]

This was a great change in the established policy and some authors expressed their disagreement with it. What is more, they found this decision unfavorable for the developing countries. It is thus not surprising that this new doctrine has been subject to controversy. For instance, Bhagwati (2001) commenting on the original AB decision (which was confirmed by the AB compliance ruling on this point) suggested that the AB had indulged in illegitimate judicial activism. He offered the judgment that the AB had been unduly concerned about "the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely." He saw this as an instance where the AB should have deferred more to the political process.[188]

The AB legal findings are, in this case, of paramount importance for the interpretation of Article XX GATT. From a legal perspective, the AB's most significant holding in the 21.5 ruling, that a multilateral agreement does not have to be concluded (even imminent) for Article XX. g GATT to be

[184] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 53

[185] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 53

[186] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 53

[187] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 54

[188] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 54

invoked, follows logically from the text and structure of XX. g, as well as the AB's original holding that nothing in Article XX GATT excludes from its ambit measures that are aimed at conditioning imports on the policies of another WTO Member (original AB ruling, para. 121).[189]

Although when the Members in the GATT want provisions to have effect, they require the Members to act in mutual correlation, Article XX of the GATT does not have that condition. On its face, Article XX.g GATT creates rights that can be exercised by a WTO Member acting without the consent of other States. It is thus different from some other kinds of limitation or exception provisions in the GATT, which do imply that the actions in question must take place within some kind of collective framework; for example, Article XX1.c GATT creates an exception that can only be invoked where Members are taking action "in pursuance of...obligations under the United Nations Charter for the maintenance of international peace and security.".[190]

This case had many economical impacts. It shows the effects on the developing countries' economics, especially the ones which have low standard of technology. US-Shrimp solution can be two-sided. From an economic perspective, it appears first that the US–Shrimp solution, which makes imports contingent on the adoption of an abatement standard can be a very effective way of addressing external effects across jurisdictions, at least when efficient abatement technology is available. In this instance, it provides exporters with appropriate incentive to adopt an efficient technology that they would not adopt otherwise and the US – Shrimp solution will typically yield a more efficient allocation than free trade.[191]

The negative part of this solution includes its side effects on free trade. However, when abatement technology is poor, the US – Shrimp solution will be very inefficient. In this instance, the importing country will impose strict abatement standards that hardly improve on its own welfare but greatly reduce welfare abroad and the Shrimp/Turtle solution will do much worse than free trade. Second, it appears that when abatement technology is inefficient, making trade contingent on the adoption of externality taxes in the foreign country would yield a superior outcome.[192]

[189] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 64

[190] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 64

[191] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 65

[192] Robert Howse and Damien J. Neven, United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 215 of the DSU by Malaysia in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2003) 65

European Communities Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R)

Although the idea to help the developing countries' economy with trade preferences is over almost half a century old, it has recently been brought to light. The WTO case brought by India in 2002 to challenge aspects of the European Communities' Generalized System of Preferences (GSP) brings fresh scrutiny to a policy area that has received little attention in recent years trade preferences for developing countries. The idea for such preferences emerged from the first United Nations Conference on Trade and Development (UNCTAD) in 1964. The ensuing negotiations led to Resolution 21(ii) at the second session of UNCTAD in 1968, acknowledging ''unanimous agreement'' in favor of the establishment of preferential arrangements.[193]

In spite of the fact that the tariff discrimination is against the GATT Agreement, it was approved by the GATT in order to help the developing countries with the Decision which became known as the Enabling Clause. Tariff discrimination violates the most-favored nation (MFN) obligation of General Agreement on Tariffs and Trade (GATT) Art. I, however, and thus the legal authority for preferential tariff schemes had to await a GATT waiver of this obligation, which came in 1971. The waiver was to expire after 10 years, but the authority for preferences was extended by the GATT Contracting Parties Decision of November 28, 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, popularly known as the ''Enabling Clause,'' and now incorporated into the law of the WTO along with the GATT itself.[194]

India posed the question what the norms that developed countries apply are when they favor a developing country, and if all the developing countries are equal when it comes to this issue. While trade discrimination favoring developing countries is the essence of any GSP scheme, India's WTO complaint raised the question of what type of discrimination is permissible must all developing countries be treated alike, or can preference-granting nations discriminate among them based on various sorts of criteria? The European system challenged by India afforded more generous preferences to the least-developed countries, to developing nations that undertook certain measures to protect the environment and labor rights, and to 12 nations involved in efforts to combat drug trafficking.[195]

Although in India, the initial request for preferences included three items, India reduced this to one. The Appellate Body ruling in some way approved different treatment of the developing countries which was based on the developing countries internal issues. India originally challenged the environmental, labor and drug-related preferences, but later limited its complaint to only the drug preferences. A WTO Panel ruled in India's favor in late 2003. The WTO Appellate Body affirmed the ruling in India's favor in early 2004, although it modified the Panel's findings in a way that seemingly

[193] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 220

[194] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 220

[195] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 121

authorized some differential treatment of developing countries based on their ‘‘development, financial and trade needs.’’[196]

Resolution 21(ii) at UNCTAD II in 1968 called for the establishment of a ‘‘generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries.’’ It further stated that such preferences had three objectives: to increase the export earnings of developing countries, to promote their industrialization, and to accelerate their rates of economic growth.[197]

Despite its objectives, with the UNCTAD resolution of a non-discriminatory system it was visible that there will be discrimination in a substantial amount. There is a major difference between the developing countries and the amount in which they can benefit from preferences. From the outset of serious negotiations within UNCTAD, however, it was clear that the ‘‘non-discriminatory system of preferences’’ envisioned by Resolution 21(ii) would in fact embody considerable elements of ‘‘discrimination.’’ Indeed, Resolution 21(ii) on its face contemplates discrimination in favor of the least-developed countries. Further, the theory behind GSP was that it would reduce the reliance of developing countries on exports of primary products and promote industrialization. Accordingly, it was understood that manufactured goods would be the main beneficiaries of preferences, and that agricultural products would be treated less favorably. This ‘‘discrimination’’ across sectors inevitably produces a kind of de facto discrimination across beneficiaries some beneficiaries have far greater capacity to produce the manufactured goods that are designated for preferential treatment than others.[198]

It can be said that the political factor was of paramount influence to the preference system. Beyond these features built into the conception of the system, political factors intruded heavily on the willingness of nations to grant preferences across the board. Some developing countries were seen as ideologically unacceptable recipients of preferences, many produced manufactured goods in politically sensitive import sectors such as textiles and footwear, and the possibility of import surges was a matter of significant concern.[199]

Along the way, some preference-granting countries began to condition GSP benefits on the willingness of beneficiary nations to cooperate on various policy margins, either by rewarding cooperation with greater preferences or punishing its absence by withdrawing them. The conception of GSP as a ‘‘non-reciprocal’’ program thus came under considerable pressure as well.[200]

The Old GSP system in European communities was rigid, yet it became flexible with time and it directed more attention to developing countries’ real needs. GSP in the European communities The European approach to GSP has evolved considerably over time. The system in place through 1994 relied heavily on quantitative limits for the importation of duty-free or reduced-duty industrial and agricultural products. The arrangement challenged by India, which is now authorized through the end

[196] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 221

[197] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 222

[198] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 222

[199] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 222

[200] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 223

of 2005, relies to a much greater extent on ‘‘tariff-modulation’’ and ‘‘special-incentive’’ arrangements, coupled with provisions for country and sectoral graduation as well as an ‘‘everything-but-arms’’ arrangement for least-developed countries.[201]

The category of goods in question designates the percentage of the tariff reduction. What is more, all the developing countries can customize its market needs and benefit through the “development index” system. The tariff-modulation arrangement classifies goods into ‘‘very sensitive,’’ ‘‘sensitive,’’ ‘‘semi-sensitive,’’ and ‘‘non-sensitive’’ products. Roughly speaking and with a few exceptions, beneficiary countries then receive tariff reductions of 15%, 30%, 65%, and 100%, respectively, off the usual MFN rate for goods in each category. Least-developed countries, however, receive duty-free treatment on goods in all categories except armaments. Countries can be completely graduated from the system based on a ‘‘development index,’’ and individual exports from particular countries can also be graduated based on a combination of considerations relating to the development index and to the beneficiary’s market share or degree of specialization in a particular product.[202]

Benefits mentioned above are not the only ones. If the developing countries prove that this is suitable, it could bring progress to other areas as well; in particular, labor and environmental issues. ‘Special-incentive arrangements’’ provide additional margins of preference to nations that apply for them and prove their eligibility. A labor arrangement applies to developing countries that have adopted the substance of the standards required by several International Labor Organization Conventions relating to, inter alia, forced labor, collective bargaining rights, non-discrimination principles, and child labor. An environmental-incentive arrangement applies to goods originating in countries with tropical forests that can establish their adherence to international standards regarding the sustainable management of tropical forests.[203]

The special arrangements supporting measures to combat drugs are made available to 11 South or Central American countries, plus Pakistan, that are involved in efforts to reduce drug trafficking. They too provide additional margins of preference on a range of products, essentially exempting goods from sector-specific graduation rules that would otherwise apply to them.[204]

Safeguard provisions are introduced in order for the developed countries to protect their industries, and in case the developing countries abuse human rights or make foul trade arrangements. Finally, the scheme contains a number of ‘‘temporary-withdrawal and safeguard’’ provisions. The most important are aimed at import surges, and allow preferences to be suspended after an investigation of such developments. Other provisions for temporary withdrawal apply to situations where the beneficiary country has been shown to have tolerated slavery, violated worker rights, exported goods of prison labor, failed to take appropriate means to control drug trafficking, engaged in fraud with respect to rules of origin, engaged in ‘‘unfair trade practices,’’ or infringed on the objectives of certain fishery conventions.[205]

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[201] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 225-226

[202] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 226

[203] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 226

[204] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 226

[205] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 227

As noted earlier, India's original complaint before the WTO challenged the labor, environmental, and drug-related preferences in the European GSP scheme, but India later restricted its challenge to the drug-related preferences. Its decision to restrict the scope of its complaint has resulted in an Appellate Body decision that leaves open many questions about the permissible scope of ''discrimination,'' as shall be seen.[206]

In the request for its rights, India relied on the core GATT principle. The legal foundation for India's challenge begins with GATT Art. I, which requires that any ''advantage, favour, privilege or immunity'' granted by one member nation to the product of another and relating, inter alia, to ''customs duties and charges of any kind,'' must also be granted ''immediately and unconditionally'' to like products originating in other member nations. This principle is commonly termed the ''most-favored nation'' (MFN) obligation of GATT.[207]

Any GSP scheme, of course, involves tariff discrimination by the preference-granting nation. It thus requires some derogation from the legal prohibition in Art. I, which was first allowed under a 10-year waiver approved by the GATT membership in 1971. During the Tokyo Round, however, GATT members negotiated an agreement to make the authority permanent, embodied in the so-called ''Enabling Clause.''[208]

The "Enabling Clause" ensures permission for favorable treatment of goods, but it never gives a list of goods or another form of benefaction that is available to the developing countries. The Enabling Clause plainly allows nations to depart from the MFN obligation to provide more favorable tariff treatment to goods from developing countries, and to provide even more favorable treatment for goods from the least-developed countries. Its text is otherwise silent on the range of goods to be covered by preferences, on the permissibility of other forms of ''discrimination'' among beneficiaries, and on the acceptability of attaching conditions (''reciprocity'') to preferential benefits. Footnote 3, however, states that the 'Generalized System of Preferences'' contemplated by the Enabling Clause is the system contemplated in the 1971 waiver, which in turn referred back to the ''generalized, non-reciprocal, and nondiscriminatory'' system of preferences discussed under the auspices of UNCTAD.[209]

India considered that its rights were denied and that European community failed to fulfill the requirement of non-discrimination under the Enabling Clause. According to India, when a nation grants a preference on a particular product, it must extend that preference to all developing countries, subject only to the proviso that least-developed nations can receive greater preferences. Because the drug-related preferences in the European scheme afford special benefits to 12 enumerated beneficiaries that are not co-extensive with the set of least-developed nations, India contended, the preferences failed the requirement of non-discrimination under the Enabling Clause and in turn violated GATT Art. I.[210]

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[206] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 227

[207] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 227

[208] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 227

[209] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 228-229

[210] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 229

Europe questioned legal base of India request and denied its violation of the Article I. However, the Panel held the view that European program had to fall within the exception afforded by the Enabling Clause in order to be legitimate. Before the Panel, Europe's first response was a formalistic claim that the Enabling Clause did not create an exception to Art. I of GATT, but removed GSP schemes altogether from the coverage of Art. I. The distinction was important, according to Europe, because India's complaint alleged a violation of Art. I but not of the Enabling Clause per se, and the Panel should only adjudicate claims brought before it. The Panel quickly put this issue to the side (over a dissent), however, and read the Enabling Clause as an exception to the MFN obligation of Art. I but for the exception, preferences would violate Art. I, and therefore India's allegation of an Art. I violation squarely raised the proper issue. Further, following WTO precedent on ''exceptions'' to primary obligations, the Panel held that Europe had the burden of demonstrating that its program fell within the exception afforded by the Enabling Clause.[211]

In spite of the fact that the Panel found a violation, Europe had a "window" to establish its defense. Europe based its defense on three arguments. Once the Panel ruled that GSP preferences fell under Art. I, the Panel had little difficulty in concluding that India made out a prima facie case of a violation. The Panel then turned to the question whether Europe could invoke the Enabling Clause and thereby establish its ''affirmative defense.'' On this front, Europe had three main arguments.[212]

In its first argument Europe claimed that different developing countries have a right to different types of preferences. First, it pointed to paragraph 3(c) of the Enabling Clause, which provides that differential treatment shall ''be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.'' Europe argued that different developing countries have different ''development, financial and trade needs,'' and that this provision authorized (and indeed required) preferences to be modified to respond to those differing needs, inevitably producing differences in the preferences across beneficiaries.[213]

Europe held an argument that a legitimate objective allows different treatments. Second, Europe argued that India misinterpreted the requirement in footnote 3 that preferences be ''non-discriminatory.'' For Europe, ''discrimination'' involved arbitrary differences in the treatment of similarly situated entities as long as differences in treatment could be justified by a legitimate objective, and the differences were reasonable in pursuit of that objective, no ''discrimination'' should be found.[214]

Third, Europe argued that paragraph 2(a) of the Enabling Clause, which authorizes ''preferential tariff treatment accorded by developed contracting parties to products originating in developing countries,'' did not require preference-granting nations to afford preferences to all developing countries. Had the drafters meant to require that preferences be extended to all, Europe suggested, they could have inserted the word ''all'' into the text.[215]

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[211] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 229

[212] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 230

[213] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 230

[214] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 230

[215] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 230

India's response to European arguments was that there is no difference between the developing countries and that they deserve equal treatment when they access for preferences. India's response to the first and third arguments was that the term ''developing countries'' in paragraphs 3(c) and 2(a) should be read as all developing countries, i.e. developing countries as a group. Preferences should respond to the ''development, financial, and trade needs'' of those countries as a group, claimed India, and should not vary in accordance with any individual needs. In India's view, paragraph 2(a) likewise provided no authority for picking and choosing among developing countries. This proposition is reinforced by footnote 3 and its reference to non-discriminatory preferences, according to India, which should be read to require formally identical treatment subject only to the exceptions specifically contemplated by the Enabling Clause.[216]

The Panel found that the text of Enabling Clause is indeterminate and in order to find the relevant context of the Enabling Clause, the Panel turned to Vienna Convention. The Panel addressed each of Europe's arguments separately, but its analysis of all three was strikingly parallel. The Panel found that the relevant portions of the text of the Enabling Clause were ambiguous. Following the Vienna Convention, it then turned to the context of the treaty text, its object and purpose, and other aids to interpretation. It noted that the Enabling Clause referred back to the waiver granted in 1971, which in turn made reference to ''mutually acceptable'' preferences. The ''mutually acceptable'' preferences were apparently those negotiated under the auspices of UNCTAD and embodied in the ''Agreed Conclusions' that eventually emerged from the ongoing negotiations in UNCTAD '.[217]

The Panel then reviewed the Agreed Conclusions at some length. It found that they anticipated some limitations on product coverage most manufactured goods would be covered, with limited exceptions, with only case-by-case coverage for agriculture. But, according to the Panel, nothing in the negotiating history seemed to contemplate discrimination among developing countries on the basis of their development or other ''needs,'' except for the special treatment of least developed nations. The only other potential limitations on coverage addressed by the UNCTAD negotiations concerned measures to withdraw preferences or to set quantitative ceilings when exporters achieved a certain competitive level, along with safeguard measures to address import surges.[218]

The Panel found that India's request had grounds in a few areas. Namely, it was stated that the developing countries form a group of developing countries and the differences in preferences are not allowed with one exception. Furthermore, it was declared that legitimate objectives give no excuse for a different preferential treatment. On the basis of these findings, the Panel accepted India's suggestion that the phrase ''developing countries'' in paragraph 2(a) referred to all developing countries, and implicitly as well its suggestion that the reference to ''developing countries'' in paragraph 3(c) was to developing countries as a group. According to the Panel, paragraph 3(c) did not authorize differences in preferences except those contemplated by the UNCTAD negotiators. Finally, the Panel found no basis in the except or relevant negotiating history for Europe's suggestion that the requirement of ''non-discriminatory'' preferences was satisfied as long as differences in treatment resulted from objective criteria relating to legitimate objectives. Rather, footnote 3 ''require[d] that identical tariff preferences under GSP schemes be provided to all developing countries without

[216] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 230-231

[217] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 231

[218] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 231

differentiation,'' excepting only the differential treatment expressly contemplated in the Agreed Conclusions.[219]

The Panel found that Europe's measures in relation to the protection of human's health were unnecessary and led to arbitrary decisions for when developing countries apply for benefits. Europe's final line of defense was an effort to invoke GATT Art. XX(b), which allows measures ''necessary to protect human ... health.'' The Panel was not persuaded, questioning whether the drug related preferences were genuinely aimed at the protection of human health in Europe, questioning their ''necessity,'' and questioning whether they amounted to an arbitrary discrimination among beneficiary nations where similar conditions prevail in violation of the chapeau to Art. XX. Europe did not appeal these findings.[220]

The Appellate Body affirmed the proposition that the Enabling Clause is an exception to GATT Art. I. India had the burden of raising the question whether Europe's system was consistent with the Enabling Clause and did so; Europe then had the burden of proving its consistency.[221]

Europe did not appeal the Panel's interpretation of paragraph 3(c) of the Enabling Clause, as the Panel had not made any explicit ''findings'' regarding the consistency of the European drug preferences with paragraph 3(c). The appeal was thus confined to the question of whether the European system was consistent with paragraph 2(a) and with its footnote 3 requiring ''non-discriminatory'' preferences.[222]

Europe and India had the same view about what discrimination is, but the Appellate Body did not determine this term so easily. On the latter issue, the Appellate Body found that the ordinary meaning of the term ''non-discriminatory'' was not sufficiently clear to permit it to choose between the competing views of discrimination put forth by India and the European Communities on that basis. Both parties agreed that ''discrimination'' entailed disparate treatment of those ''similarly situated,'' but disagreed on what it meant to be ''similarly situated'' and an appeal to the ordinary meaning of the term ''discrimination'' did not resolve such a disagreement.[223]

During the interpretation of the paragraph 3(c) the Enabling Clause the Appellate Body came to conclusions that preference system is not the same for all the GSP beneficiaries, and that the needs of the developing countries are not identical. The Appellate Body then turned to paragraph 3(c) of the Enabling Clause to provide further context for the interpretation of the nondiscrimination obligation, and accepted the European argument that the absence of the word ''all'' before ''developing countries'' implied that the text imposed no obligation to treat all developing countries alike. Further, both parties apparently conceded that the development needs of various countries could differ. Accordingly, the Appellate Body was ''of the view that, by requiring developed countries to 'respond

[219] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 231-232

[220] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 232

[221] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 232

[222] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 232

[223] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 232

positively' to the 'needs of developing countries,' which are varied and not homogeneous, paragraph 3(c) indicate[d] that a GSP scheme may be 'non-discriminatory' even if 'identical' tariff treatment is not accorded to 'all' GSP beneficiaries.''[224]

It thus reversed the Panel's finding to the contrary. Likewise, the Appellate Body reversed the Panel's finding that the reference to ''developing countries'' in paragraph 2(a) was to all developing countries. It held that preference granting countries are permitted to treat beneficiaries differently when such differences ''respond positively'' to varying ''development, financial, and trade needs.''[225]

The obligation of non-discrimination was not unrecognized and the burden of proof that the preferences granted under the Drug Arrangements were not discriminatory allowed was at the European Communities. The non-discrimination requirement was not without bite in the view of the Appellate Body, however, because it did require ''that identical tariff treatment must be available to all GSP beneficiaries with the 'development, financial [or] trade need' to which the differential treatment [was] intended to respond.'' Because there was no specific finding by the Panel regarding the consistency of the European drug related preferences with paragraph 3(c), the Appellate Body was prepared to accept arguendo that drug trafficking related to a ''development need.'' Even so, the preferences would still fail the nondiscrimination test unless ''the European Communities prove[d], at a minimum, that the preferences granted under the Drug Arrangements [were] available to all GSP beneficiaries that [were] similarly affected by the drug problem.[226]

The Appellate Body then held that the European Communities failed to carry the burden of proof on this issue. It emphasized that the drug-related preferences were available only to a ''closed list'' of 12 countries. The regulation creating the preferences did not set out any criteria for the selection of the countries, and it did not provide any mechanism for adding or deleting countries as their circumstances changed. Under these conditions, Europe failed to demonstrate that its preferences were non-discriminatory.[227]

The Appellate Body noticed that in others arrangements in the European GSP scheme there was a clear condition to become beneficiary. This was not the case with drug-related preferences and this left room for speculations. Along the way, the Appellate Body contrasted the labor and environmental incentive arrangements in the European GSP scheme. Unlike the situation with the drug-related preferences, the regulation creating the labor and environmental incentives provided ''detailed provisions setting out the procedure and substantive criteria that apply to a request ... to become a beneficiary under either of those special incentive arrangements.'' The Appellate Body thus hinted that those aspects of the European scheme might pass the non-discrimination test if challenged, but

[224] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 233

[225] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 233

[226] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 233

[227] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 233-234

did not speak to the concurrent issue of whether the labor and environmental incentives responded to legitimate ‘‘development, financial, and trade needs.’’[228]

As with most hard cases, it is difficult to say which side was ‘‘right’’ on a purely legal basis. The case is hard because, as both the Panel and the Appellate Body acknowledged, the text of the Enabling Clause is ambiguous. Even assuming that footnote 3 was intended to create a binding non-discrimination obligation, as the parties to the case assumed, the absence of any definition for the concept opens the door to a wide range of interpretations.[229]

In the context of UNCTAD negotiation, the Panel came to a conclusion what is mutually acceptable. In the face of such ambiguity, the Panel relied primarily on historical context and the UNCTAD negotiations to give footnote 3 some definitive content. The 1971 waiver referenced in footnote 3 indeed contemplates ‘‘mutually acceptable’’ preferences, and the Agreed Conclusions from the UNCTAD negotiations may well have been a good indicator of what was ‘‘mutually acceptable.’[230]

While the idea behind UNCTAD negotiations and Agreed Conclusions was the sign of good will of the developed countries and in some way lenient towards the developing countries, it also represented the obligation for the developed countries. UNCTAD negotiations may be viewed as an effort to bring the attendant negative externalities under greater discipline, and the Agreed Conclusions may be seen as the embodiment of a negotiated arrangement with the following central characteristics: the developed nations agreed that they would tolerate the negative consequences for themselves associated with preferences for developing nations, at least within the agreed parameters. But they also committed themselves to ameliorate the negative consequences of discriminatory preferences for developing nations by moving toward the ‘‘generalized, non-reciprocal, and non-discriminatory preferences’’ contemplated by the 1971 waiver.[231]

It should not be left to the free will of the developed countries to asses which level of discrimination they can apply and their individual evaluation should not become the foundation for justification of the discrimination policies. If developed nations are allowed to engage in whatever degree of discrimination they wish without legal constraint, an essential purpose of the UNCTAD negotiations is clearly jeopardized. And even if nations are only allowed to afford differential treatment according to their assessment of the individual ‘‘development, financial, and trade needs’’ of beneficiary countries, the danger still arises that they will use such authority to justify discriminatory policies that benefit countries in favor rather than for any legitimate purpose.[232]

The parties to the UNCTAD negotiations were aware of the potential political impediments to the implementation of GSP, and might well have thought that compromise on various margins, in ways not fully anticipated during the negotiations, would be mutually preferable to political impasse and the status quo ante. It is also noteworthy that major GSP schemes put in place after UNCTAD II from the

[228] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 234

[229] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 234

[230] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 235

[231] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 235

[232] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 235-236

outset contained exemptions and restrictions that were not specifically contemplated in the Agreed Conclusions.[233]

Indeterminate language of the Enabling Clause created a problem to The Panel and the Appellate Body in resolving this dispute. In order to find true context and objectives of the text they resort to Vienna Convention. There can be little doubt that a central ‘‘object and purpose’’ of the UNCTAD negotiations was to reduce discrimination in trade preferences subject to some enumerated exceptions, and that both the 1971 waiver and the Enabling Clause may be said to incorporate this goal by reference.[234] Despite the Panel promoted this objective it can be said that GSP benefits are present to developing countries. Developing nations may well have been aware that various forms of conditionality would be the quid pro quo, and the 1979 Enabling Clause could easily have done much more to condemn it in clear language if that was the intention of its drafters.[235]

This case is important because The Appellate Body ruling establishes two important principles: (1) footnote 3 of the Enabling Clause is a binding legal obligation, requiring ‘‘generalized, non-reciprocal, and non-discriminatory preferences;’’ and (2) donor countries may nevertheless afford differential treatment to beneficiary nations if it is based on differences in their ‘‘development, financial, and trade needs.’’ These principles raise a wide array of issues to which the Appellate Body has not yet spoken.[236] In short, the Appellate Body decision puts in question many prominent features of the US, European, and other GSP schemes, features that in some cases have been part of those schemes from the outset. It invites future challenges by countries that suffer trade diversion because of discrimination or reciprocity, even perhaps by developed nations. Donor countries will have the burden to prove their compliance with the Enabling Clause since it has now been ruled to be an ‘‘exception’’ to GATT Art. I. That burden may prove a difficult one to carry.[237]

[233] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 236

[234] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 237

[235] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 237

[236] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 238

[237] Gene M. Grossman and Alan O. Sykes, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2003* (Cambridge University Press 2006) 240

Chapter Five

Dispute settlement under WTO

Dispute settlement was developed through the GATT practice. What is more, the rules that were in the GATT articles were changed and applied by the WTO. The WTO dispute settlement system, which has been in operation since 1 January 1995, was not established out of the blue. It is not an entirely novel system. On the contrary, this 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 for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947 and the rules and procedures as further elaborated and modified herein.[238]

While the GATT did not have many provisions, it had a lot of success with settling the disputes, because it used experienced diplomats to make the system in which disputes would be settled. The GATT 1947 contained only two brief provisions on dispute settlement (Articles XXII and XXIII), which neither explicitly referred to 'dispute settlement' nor provided for detailed procedures to handle disputes. However, the GATT Contracting Parties 'transformed', in a highly pragmatic manner over a period of five decades, what was initially a rudimentary, power-based system for settling disputes through diplomatic negotiations into an elaborate, rules-based system for settling disputes through adjudication.[239]

Through the year, the GATT system showed its flaws. The major one was that its decisions were binding only by consensus, which left a lot of room to a dissatisfied party to block the Panel directives. While for decades quite successful in resolving disputes to the satisfaction of the parties, the GATT dispute settlement had some serious shortcomings which became ever more acute in the course of the 1980s. The most important shortcoming related to the fact that the findings and conclusions of the panels of experts adjudicating disputes only became legally binding when adopted by consensus by the GATT Council. The responding party could thus prevent any unfavourable conclusions from becoming legally binding upon it.[240]

The most important shortcoming of the system related to the manner in which key decisions were taken. These key decisions on:

* the establishment and composition of a panel,

* the adoption of a panel report, and

* the authorisation of the suspension of concessions,

[238] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 159

[239]Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 159

[240] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 159

were all to be taken by the GATT Council by consensus. The responding party could thus delay or block any of these decisions and paralyse or frustrate the operation of the dispute settlement system. In particular, the adoption of panel reports became a real problem from the late 1980s onwards.[241]

With these issues, it meant that the Panel was in a situation to make a decision by means of compromise and it questioned the legality of decision. Moreover, the fact that the losing party could prevent the adoption of the panel report meant that panels were often tempted to arrive at a conclusion that would be acceptable to all parties, regardless of whether that conclusion was legally sound and convincing.[242]

This made it impossible for the dispute settlement to work on controversial disputes. The dispute settlement was a major issue in the Uruguay Round. The main concern was to make the GATT rules more effective and enforceable. Also it was important that the decisions were applied properly.

The improvement of the GATT dispute settlement system was high on the agenda of the Uruguay Round negotiations. The 1986 Punta del Este Ministerial Declaration on the Uruguay Round stated with regard to dispute settlement:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.[243]

The Members introduced numerous changes in the dispute settlement system. However, the major issue was still open. It was the way how the Panel reports were adopted. Already in December 1988, the negotiators had agreed on a number of improvements to the GATT dispute settlement system. These improvements included the recognition of the right of a complainant to bring a case before a panel and strict timeframes for panel proceedings. No agreement was reached, however, on the most difficult issue, namely, the issue of the adoption of panel reports by consensus.[244]

The Act of the US brought a lot of changes regarding the settlement system. The United States claimed that the GATT system is not capable of protecting their trade interests. However, other GATT Contracting Parties were against this one sided US policy and objected it. However, in the course of 1989, the general sentiment of the Contracting Parties changed dramatically. The cause for this change was the US Trade and Competitiveness Act of 1988, which considerably extended and intensified section 301 of the US Trade Act of 1974. Section 301 provides for the imposition of unilateral trade sanctions against other countries which the United States considers to be in violation of their GATT obligations. The 1988 Trade and Competitiveness Act created a new ‘Super 301’ and several other ‘Special 301s’. The other GATT Contracting Parties were greatly alarmed by this new legislation and the system of ‘vigilante justice’ it strengthened. They demanded that the United States change its legislation. The United States, however, argued that the existing GATT dispute settlement

[241] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 180

[242] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 180

[243] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 181

[244] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 180-181

system, as a result of the consensus requirement, was too weak to protect US trade interests effectively.[245]

This offset finally brought the development and adoption of a new set of rules. These were called the DSU and are a part of the WTO Agreement. What is more, this was the greatest accomplishment of the Uruguay Round. In this way, agreement was eventually reached on the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU. The DSU is attached to the WTO Agreement as Annex 2, and constitutes an integral part of that Agreement. The DSU provides for an elaborate dispute settlement system, and is often referred to as one of the most important achievements of the Uruguay Round negotiations.[246]

As it was mentioned, the GATT law made enormous impact on the DSU. The DSU is an integral part of the WTO Agreement and is enforceable for all disputes that originated from the WTO Agreements. The DSU is based on, but significantly expanded, GATT dispute settlement law and practice. It provides a single dispute settlement mechanism applicable to all current WTO agreements – the Agreement Establishing the World Trade Organization (the Marrakesh Agreement); the 12 WTO multilateral agreements on trade in goods (i.e.covering GATT 1994, agriculture, customs valuation, import licensing, anti-dumping, subsidies and countervailing measures, trade-related investment measures, product standards, sanitary and phytosanitary measures, preshipment inspection, rules of origin, and safeguards); the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS); two plurilateral agreements (i.e. covering government procurement and trade in civil aircraft); and the DSU itself.[247] The DSU provided in this way a unique way of settling disputes with the exception of special or additional rules. Namely in the Article 1.2 the DSU: The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail.[248]

The principal issue object of the WTO dispute settlement was an efficient settlement of the disputes between the Members and ensuring that their rights would be respected.

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[249]

The well-timed settlement of the disputes should provide security to the Members. Furthermore, the equilibrium must be established between the rights and obligations of the Members.

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another

[245] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 181

[246] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (1st edn, Cambridge University Press 2005) 181

[247] Bruce Wilson, The WTO dispute settlement system and its operation: a brief overview of the first ten years. in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 15-16

[248] Article 1.2, DSU

[249] Article 3.2, DSU

Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.[250]

The jurisdiction of the DSB has three key marks. Namely, it is compulsory, exclusive and contentious. A Member has no right but to accept the jurisdiction of the DSB. A Member does not need to accept other covered agreements; the Membership itself is enough to constitute the WTO jurisdiction.

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.[251]

Exclusive jurisdiction means that when disputes arise from the covered agreement, the WTO is the only one that can resolve these disputes. This brought exclusivity and legal certainty to the WTO.

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.[252]

The WTO decisions have contentious jurisdiction. The DSB can not make new rules or add new right to the one provided in covered agreement.

Besides many function that WTO Secretariat has it also has additional from DSU. The DSU assigns specific functions to the WTO Secretariat regarding the operation of the WTO dispute settlement system. In particular, the DSU assigns to the Secretariat certain responsibilities in the panel composition process as well as certain responsibilities regarding assistance to panels and to Members.[253]

Article 8 of the DSU governs that the Secretariat always has a list of potential candidates for the Panels. With respect to panel composition, Article 8 directs the Secretariat to maintain an indicative list of governmental and non-governmental individuals from which panelists might be drawn as appropriate. In addition, when panels are being composed, after they have been established by the DSB, the Secretariat is to propose nominations for the panel to the parties to the dispute.[254]

What is more, the Director-General has the authority and obligations to compose the Panel if the parties, have no solution of the disagreement for Panelist after the deadline. Moreover, if there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall appoint the individuals who shall serve on the panel, after consulting with the parties to the dispute.[255]

Under article 27 the DSU Secretariat has the responsibility to help the Panels in legal matters and to help the developing countries in the dispute settlement.

[250] Article 3.3, DSU
[251] Article 6.1, DSU
[252] Article 23.1, DSU
[253] Bruce Wilson, The WTO dispute settlement system and its operation: a brief overview of the first ten years in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 19
[254] Bruce Wilson, The WTO dispute settlement system and its operation: a brief overview of the first ten years in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 19
[255] Bruce Wilson, The WTO dispute settlement system and its operation: a brief overview of the first ten years in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 19

Dispute Settlement Body

The Dispute Settlement Body can be called the alter ego of the General Council. The Dispute Settlement Body is in fact the General Council, the supreme decision-making body of the WTO in the absence of the Ministerial Conference, which convenes to discharge the responsibilities provided for in the Dispute Settlement Understanding (DSU).[256]

Like the General Council, the DSB is composed of highest rank diplomats. What is more, the DSB constituted practice that made fulfillment of obligations by the Members easier. The DSB is composed of the representatives of all Members. It has its own Chairman, usually with the rank of ambassador, who is elected from among the representatives of Members at the beginning of the year to preside over the proceedings of DSB meetings. The DSB also hast the power to establish rules of procedure as it deems necessary for the fulfilment of those responsibilities. To this effect, from the outset, the DSB developed working practices in order to handle practical matters such as submissions of notifications and circulation of dispute settlement documents at times when legal deadlines might fall on a WTO non-working day.[257]

The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have 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 agreements.[258]

The DSB have very broad authority to administer rules. However, it is important to note that the DSB's main role is to provide a framework to enable WTO Members to express their views and to provide their comments on the legal interpretations and reasonings of panels and the Appellate Body.[259]

It is provided that all the decisions are taken by consensus. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.[260]

It is important to note, however, that, for some key decisions, such as: (1) the decision on the establishment of panels; (2) the adoption of panel and Appellate Body reports; and (3) the authorisation of suspension of concession and other obligations, the consensus requirement is in fact a 'reverse' or 'negative' consensus requirement.[261] The 'reverse' consensus requirement means that the DSB is deemed to take a decision unless there is a consensus among WTO Members not to take that decision. Since there will usually be at least one Member with a strong interest in the establishment of a panel, the adoption of the panel and/or Appellate Body reports or the authorisation to suspend concessions, it is unlikely that there will be a consensus in the DSB not to adopt these decisions.[262]

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[256] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 25

[257] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 25

[258] Article 2.1, DSU

[259] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 25

[260] Art 2.4, DSU

[261] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 206

[262] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 207

In this way the Panels are established and there is factually always someone that is interested in Panel constitution. Thus, panels are established automatically upon the second request, since the responding party has the right to reject the establishment of the panel when the item appears on the DSB agenda for the first time. It is also possible for the complaining party to ask the DSB to hold a special meeting (as opposed to a regular meeting) to accelerate the process.[263]

When a Panel is formed the DSB does not participate any more in the procedures. Once a panel's proceedings have begun, the DSB has no involvement, except that it has to be notified if the panel decides to suspend its proceedings as well as in situations where the panel cannot issue its report within six months.[264]

The DSB has the authority to adopt the Panel. However, the parties are expected to put the report on the DSB's agenda. After a panel report is circulated as a WTO document, it must be adopted or appealed within 60 days from the date of circulation. Under current practice, a decision to place panel reports on the agenda of the DSB meeting for adoption rests with the parties to the dispute. If an appeal is filed, consideration of the panel report is postponed until the appellate review proceeding has concluded and, consequently, the item is removed from the DSB agenda.[265] The DSB decides if it will adopt the reports. However, these reports are usually adopted. After an Appellate Body report is circulated, it must be adopted by the DSB within 30 days of its circulation. The DSB has the power to decide by consensus not to adopt the panel or Appellate Body reports.[266]

At the end of the process, the DSU has another important role. It supervises the implementation of reports and the retaliation, in case that they are not implemented. Subsequently, six months after the date of determination of the time period for implementation, the next step is for the DSB to monitor progress in implementation. That means in practice that the party that is requested to bring its measure into compliance will have to provide a status report on the progress it is making in implementation.[267]

Any Member has the right to use the WTO system if it deems that the other Member jeopardized their rights. The WTO has a system of procedures and independent bodies that protect the rights and obligations. The WTO dispute settlement system is a rules-based system as opposed to a negotiation-conciliation-mediation type of dispute resolution mechanism. The system includes procedural steps that can be triggered by any WTO Member dissatisfied with another Member's measure considered to be inconsistent with any provision of the WTO Agreement. The system allows the dissatisfied Member to obtain a legal ruling by an independent adjudicative body on its rights and obligations under the relevant agreements. The dispute settlement system of the WTO is thus quasi-judicial: independent and autonomous bodies are responsible for adjudication of disputes although formally subject to the overall authority of the Dispute Settlement Body (DSB).[268]

[263] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 26

[264] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 27

[265] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 27

[266] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 27

[267] Bozena Mueller-Holyst, The role of the Dispute Settlement Body in the dispute settlement process in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 27

[268] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 29

Given the fact that the system has negative consensus, it is up to parties' will to stop the process. The WTO dispute settlement system is quasi-automatic because it operates on the basis of 'reverse, or negative, consensus'. WTO-related disputes once triggered, the process can only be stopped with the consent of all parties to the dispute.[269]

The Members cannot unilaterally conduct if it were the violation of the WTO provisions. Thus they must operate through the WTO dispute system.

Under the Article 23.2a of the DSU it is provided that: not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.[270]

Stages in WTO dispute settlement system

The first step to resolve the dispute is through the consultations. In this way the DSU places emphasis on a non-adjudication resolution of a dispute. Furthermore, before a request for a Panel is made, there is another step in which consultation takes place, and this step cannot be avoided. The DSU emphasizes the importance of consultations in dispute resolution, requiring a Member to enter into consultations within 30 days of such a request from another Member. The request for consultations is made in the form of a letter identifying the basic facts and legal claims; such request is sent from one Member to another and copied to the DSB and the WTO Secretariat. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. In addition, if the defending party does not respond to the request for consultations within ten days of the receipt of the request or if consultations are not held within 30 days of the receipt of the request, the complaining party may request the DSB to establish a panel.[271]

The Panel procedure

When consultations do not give the desired results, the Panel is established by the DSB. Panels are not permanent bodies. Their purpose is to adjudicate one dispute after which they are dissolved.

Parties request for a Panel must be in writing. In that way legal issue is identified, the scope of jurisdiction, and other parties involved in the dispute are informed.

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[272]

The panel is established at the latest at the second DSB meeting at which the panel request is discussed. At this meeting, the panel is established unless the DSB decides by consensus not to establish a panel ('reverse consensus').[273]

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[269] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 29

[270] Article 23.2a, DSU

[271] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 31

[272] Article 6.2, DSU

[273] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 213

Panels are composed of three persons. Panels must be composed of high-qualified individuals. A Panelist must be independent and cannot participate in disputes where their country is a Member of dispute. Under Article 8.10 the DSU, developing countries can request a Panelist from developing country Members.

When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.[274]

Under Article 7.1 of the DSU unless the parties did not agree otherwise, within 20 days from the establishment of the Panel, the Panel has these terms of reference: To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).[275]

Which means that the parties involved in the dispute can agree on special terms of reference within 20 days from establishing the Panel. The practice of the DSB, so far, has been to refer, in the standard terms of reference, to the document in which the complaining party(ies) has(ve) requested the establishment of the panel, and to leave it to the panel to decide on any jurisdictional issue, the applicable law and whether adequate consultations have taken place before the establishment of a panel.[276]

As mentioned above, with the assistance of the Secretariat, the parties select the Panelists. The Panel considers with the parties how it will conduct the work. Within a week of the panel's composition, the panel will usually meet with the parties to discuss the organization of its work. After these consultations with the parties, the panel will finalize its procedures and its time table on the basis of the DSU and its Annexes, and the parties' comments.[277]

In Article 12 of the DSU there are rules for the Panel procedure. What is more, the Article 12.1 administrates that the parties must follow the Working Procedures in Appendix 3. However, it allows the Panel to do otherwise if the parties agree.

Members that prove that they have certain amount of interest are allowed to take part in the first meeting of the Panel as the third party. Under the DSU, Members that have a 'substantial interest' in a matter before a panel and that have notified their interest to the DSB can become third parties. In practice a systemic interest suffices to constitute a substantial interest. Third parties receive the first submissions of the parties, can make written submissions and are given an opportunity to participate in the first meeting of the panel – there is usually a special session for third parties during the first meeting of the panel with the parties, where they can make oral submissions to the panel.[278]

The parties write two types of submissions. The first one includes the factual information concerning the case and what their arguments are. The second one incorporates the arguments to others parties, evidence, and facts. Before the first substantive meeting of the panel with the parties, the panel receives written submissions from the parties in which they present the facts of the case and their arguments. Parties will exchange their first set of written submissions in a sequential manner

[274] Article 8.1, DSU
[275] Article 7.1, DSU
[276] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 35

[277] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 35

[278] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 39

according to the timetable determined at the organizational meeting. After the first panel meeting, parties will then exchange simultaneous rebuttals (second written submissions).[279]

The first Panel meeting is where the oral hearing takes place. Both parties give their arguments and statements. Furthermore, the third parties here present their perspective of the case. At the first substantive panel meeting, the complaining party will present its evidence and legal arguments orally. It will usually submit a written copy of its oral statement which often contains the complaining party's first response to the first submission of the defending party. Subsequently, and still at the same meeting, the defending party will present its views. All third parties in the dispute will also be invited to present their views at the first substantive meeting of the panel during a session set aside for that purpose. After responding to the panel's questions at the first meeting and filing their written rebuttals (second written submissions), the parties will meet with the panel for a second time. At the second meeting (which usually takes place four to six weeks after the first meeting), the defending party will usually take the floor first, followed by the complaining party.[280]

The Panels are usually thorough in the procedure. What is more, the parties have to prepare a lot of material for the Panel meeting which they present orally and in writing. Traditionally, panels ask both factual and legal questions of the parties and third parties. Parties are invited to respond orally and are also given time to respond in writing in the days following the panel meeting. Indeed, between the first and the second meeting, parties will usually have to answer numerous questions posed by the panel as well as submitting their written rebuttals.[281]

The DSU does not provide any reference for the burden of proof. However, Article 13 of the DSU gives great investigative authority to Panels to seek information from the Member or to consult experts.

Under the Articles of the DSU panel are obliged to follow principles of interpretation of public international law in the determination of the WTO rights and obligations of parties to a dispute. What is more including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'.[282]

The Panel makes the draft of the report that is subjected to changes if the parties' proposal for the changes is valid. Usually within four weeks after its second meeting, the panel will issue the draft descriptive part of its report, to which parties are invited to make comments within two weeks. The panel will then take into account the suggestions by the parties and modify its descriptive part accordingly.[283]

After this there is another report that is also available for the parties to comment. Subsequently, the panel will issue an interim panel report, including the revised descriptive part and the interim findings and conclusions of the panel on the legal issues. Again the panel will invite the parties' comments on this interim report. Parties are also entitled to request another meeting with the panel. Subsequently, the final report of the panel will be issued to the parties before it is translated into the two other

[279] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 39

[280] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 39-40

[281] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 40

[282] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 41

[283] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 42

official languages of the WTO (usually Spanish and French since the working language of almost every panel is English) and then circulated to all Members.[284]

Article 19 of the DSU limits the scope of the Panel. It can only give recommendations or suggest how they should be implemented. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement . In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.[285]

Nevertheless, the parties have free will to decide on the best way to compensate. But these suggestions are only suggested ways in which a Member 'could' decide to implement. It is, however, possible for parties to a WTO dispute to agree on any form of compensation to resolve the matter.[286]

The deadlines for the Panel procedures are given in the Articles of the DSU. It is envisaged that a panel should normally complete its work within six to nine months or, in cases of urgency, within three months. If a panel cannot complete its work within nine months from its establishment, it must notify the DSB accordingly. Most panels usually take around nine months from the date of their composition to complete their work.[287]

The final panel report is first issued to the parties to the dispute, and some weeks later, once the report is available in the three working languages of the WTO, it is circulated to the general WTO membership.[288]

Article 16.4 of the DSU that within 60 days of circulation of panel to the Members it is adopted unless 1) a party to the dispute formally notifies the DSB of its decision to appeal; or (2) the DSB decides by consensus not to adopt the report.[289]

If a panel report is appealed, it is not discussed by the DSB until the appellate review proceedings are completed and the Appellate Body report – together with the panel report – comes before the DSB for adoption. When the DSB does consider and debate a panel report, the parties to the dispute, as well as all other Members, have the right to comment on the report.[290]

[284] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 42

[285] Article 19, DSU

[286] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 43

[287] Gabrielle Marceau, Consultations and the panel process in the WTO dispute settlement system in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 44

[288] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 282

[289] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 282

[290] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 282-283

The Appellate Body procedure

The Article 17 of the DSU gave authority to Dispute Settlement Body to establish Appellate Body The Understanding on the Rules and Procedures for the Resolution of Disputes, commonly referred to as the Dispute Settlement Understanding (DSU), provided in Article 17.1 that 'a standing Appellate Body shall be established by the [WTO Dispute Settlement Body]'. Pursuant to this mandate, the Dispute Settlement Body (DSB) established the Appellate Body by its Decision of 10 February 1995 (WT/DSB/1).[291]

At first there was doubt that the Appellate Body will become the milestone for the dispute settlement process in the WTO. In Article 17 of the DSU, neither the Appellate Body nor the judges bear the name of the juridical institutions. The proposition that the decision to establish a standing Appellate Body was an afterthought, rather than the reflection of a grand design to create a strong, new international court, finds support in the relevant provisions of the DSU as well as in the Decision of February 1995 on the establishment of the Appellate Body. As noted above, Article 17 of the DSU provides for the establishment of 'a standing Appellate Body'. The choice of the unappealing, technical, non-descriptive term 'Appellate Body' as the name for this new institution, is telling for the aspirations of the negotiators. It is no coincidence that the new institution was not called the World (or International) Trade (Appeals) Court (or anything similar with the word 'court' in it). It is no coincidence either that Article 17 does not refer to the persons serving on the Appellate Body as 'judges', but merely as 'persons'.[292] The scope of Appellate Body is limited to legal findings of panel report.

While it has the authority to asset all legal issues, its mandate is to evaluate and if necessary change the Panel conclusions.. Article 17 first defines the task of the Appellate Body in very general terms as hearing appeals from panel cases, but subsequently, narrows the scope of appellate review and the mandate of the Appellate Body considerably. Pursuant to Article 17.6 of the DSU, appeals are limited to issues of law covered in the panel report and legal interpretations adopted by the panel. Generally speaking, the panel's findings on factual issues thus escape appellate review. The Appellate Body must address each of the legal issues raised during the appellate review proceeding but its mandate is – according to Article 17.13 of the DSU – ultimately limited to upholding, modifying or reversing the panel's legal findings and conclusions.[293]

In contrast to other international courts, the AB has significantly smaller capacity. What is more, the AB has never held a hearing in its full capacity. According to Article 17.1 of the DSU, the Appellate Body shall be composed of seven persons. Compared with international courts, such as the International Court of Justice (ICJ), the International Criminal Court (ICC) and the International Tribunal for the Law of the Sea (ITLoS), which comprise 15, 18 and 21 judges respectively, the small size of the WTO Appellate Body is striking. Moreover, Article 17.1 provides that appeals are never heard by the Appellate Body en banc, but always by only three of the seven persons serving on the Appellate Body.[294] Furthermore other part that is not in common with other international courts is

[291] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 64

[292] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 65

[293] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 65

[294] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 65-66

privacy of the proceedings. Article 17.10 of the DSU provides that the proceedings of the Appellate Body shall be confidential. This blanket requirement of 'secrecy' is clearly a legacy from the days when trade disputes were resolved through diplomacy rather than adjudication. Confidentiality of this nature is alien to international court proceedings.[295] The last and the biggest difference is that the AB reports are, although formally, still subdued to the political body. Finally, Appellate Body reports must be adopted by the DSB; they are not legally binding on the parties to the dispute without such adoption. Although the DSB adopts Appellate Body reports by reverse consensus, and the adoption is thus quasi-automatic, this adoption is still a formal requirement. The legal power of decisions of international courts, such as the ICJ, the ICC and the ITLoS, is never subject to the approval of a political body.[296]

There are numerous of reasons for which the AB has had success over the years; in particular, the excellent choice of the AB Members, working procedure, the use of the international customary law, and its case law. A first important factor contributing to the rise to prominence of the Appellate Body has been its first and subsequent compositions. The DSB definitely appointed the 'right' persons to serve on the Appellate Body.[297] A second important factor in the rise to prominence of the Appellate Body has been the Working Procedures for Appellate Review adopted by the Appellate Body in February 1996. The first task of the members of the Appellate Body after their appointment in November 1995 was to draw up detailed working procedures. In their Working Procedures, the members made fundamental choices with regard to the nature and the conduct of the appellate review proceedings. The two main characteristics of these proceedings are their judicial nature and the importance given to collegiality.[298] A third important factor in the rise to prominence of the Appellate Body has been the early use and consistent application of the rules of interpretation of the Vienna Convention of the Law on Treaties. Article 3.2 of the DSU stipulates in the relevant part that the dispute settlement system serves 'to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law'.[299] The Appellate Body would not have gained the prominence it has today if parties to disputes had not made such frequent use of the possibility to appeal panel reports and the recourse to, or involvement in, appellate review had been limited to a few WTO Members only. Likewise, the Appellate Body would not have gained its current prominence if only a few WTO agreements had been the subject of appellate review. A fourth important factor in the rise to prominence has therefore been the high number of appeals, the relatively high percentage of the WTO membership that has been involved in appellate review proceedings to date and the broad substantive scope of appeals.[300] The last but arguably most important factor in the rise to prominence of the Appellate Body has been its case law, and in particular the case law balancing free trade and other societal values as well as the case law ensuring the fairness and effectiveness of the WTO dispute settlement system. In general, the case law of the Appellate Body carefully balances free trade with other societal values, such as public health, the environment, or consumer protection. This balance is of course primarily set out in numerous

[295] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 67

[296] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 67

[297] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 68

[298] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 69

[299] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 72

[300] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 73

provisions of the WTO agreements, but the Appellate Body has clarified this delicate balance and applied it in specific cases.[301]

When the appeal is brought to the Appellate Body, automatically, the process begins; it is programmed in such a way. The Appellate Body has jurisdiction only over legal issues and it has no authorization to make the finding of the facts.

The appellate phase is rather short. The first part of the procedure for both sides is to provide the AB with the arguments for their claims. The WTO appellate phase is a 90-day process involving a written phase and an oral phase. According to the Working Procedures for Appellate Review, appellants must submit an appellant's submission setting out their arguments within ten days after filing a Notice of Appeal, and appellees must submit their arguments in an appellee's submission within 15 days thereafter (or 25 days after the filing of the Notice of Appeal).[302]

Article 17.4 of the DSU enables the third parties to take part in the appellate process. The third parties can be heard by the appellate body. Only parties included in the dispute, not the third parties, may appeal the Panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.[303]

The hearings of the parties are kept in secrecy and are taken in front of three Members of the Appellate Body. These three Members serve as the Division and are selected even if the parties to arbitration are the same nationality as they are. The procedural rules require the Appellate Body to hold a hearing. The proceedings are confidential; only WTO Members that are parties to the dispute are permitted to attend. The hearing usually takes place between 35 and 45 days following the filing of the Notice of Appeal. Three of the seven members of the Appellate Body, referred to as a Division, hear an appeal. The three are selected by the Appellate Body on the basis of rotation and taking into account the principles of random selection, unpredictability and opportunity for all members to serve, regardless of their nationality.[304]

The parties give statements which vary, but they usually take half an hour. Nevertheless, it depends on the issues that are brought up. Also, the third party has the right to bring its arguments fort. Appellants and appellees are each given an opportunity, at the beginning of the hearing, to make an opening statement. The length of such statements is set by the Division hearing the appeal and varies depending on the issues and number of participants involved. Opening statements may be as short as 15 minutes, or as long as an hour; most often, they are 20 or 30 minutes in duration. Third parties that have filed a written submission or that have notified their intention to attend the hearing will also be given an opportunity to make opening statements, although their length is usually limited to five or ten minutes.[305]

It can be said that the Division uses the interrogative method in order to clarify the situation. Without the previous preparation and no right to write the responses, later hearings boost the process up. Following the opening statements, the Division puts questions to the participants seeking to elicit clarifications or further comment on the issues raised on appeal. Unlike the panel phase, the questions are not provided in writing and must be answered immediately. There is no opportunity to provide

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[301] Peter Van den Bossche, The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization in Rufus Yerxa and Bruce Wilson (eds), *Key Issues In WTO Dispute Settlement* (Cambridge University Press 2005) 77

[302] Valerie Hughes, Special challenges at the appellate stage: a case study in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 80

[303] Article 17.4, DSU

[304] Valerie Hughes, Special challenges at the appellate stage: a case study in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 81

[305] Valerie Hughes, Special challenges at the appellate stage: a case study in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 81-82

additional written responses some days following the hearing, as there is after a panel hearing. At the end of the hearing, participants are given an opportunity to make brief closing statements of about ten minutes in length. The hearing usually lasts one to two days, although some have been longer.[306]

Before the Division prepares the report, it is necessary to hold the consultations with the other Member of the AB. This is done in order to have practice that is predictable and decision making that is reliable. After the hearing, the Division meets with the other four Members of the Appellate Body to 'exchange views' on the issues raised on appeal. The four Appellate Body members who are not on the Division hearing the appeal receive copies of all submissions, as well as a copy of the transcript of the hearing. The purpose of the 'exchange of views' is to 'ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the members'. After the exchange of views, the Division deliberates and prepares its report. The Appellate Body report is circulated to all WTO Members in English, French and Spanish no later than 90 days following the filing of the Notice of Appeal.[307]

Under the DSU provisions, a Member informs the DSB about the measures it will implement to comply with the rulings of the DSB, and is given reasonable time to do so. If parties do not agree on the time needed to comply with the rulings of the DSB they can seek arbitration.

Until the ruling is implemented the DSB will monitor its implementation. Starting six months after establishment of the reasonable period of time, the issue of implementation is placed on the agenda of each DSB meeting and remains on the DSB's agenda until the issue is resolved. At least ten days prior to such a DSB meeting, the Member concerned must provide the DSB with a status report on its progress in the implementation of the recommendations or rulings.[308]

Between the parties there can be misunderstandings with which the WTO measures are consistent. Therefore, the Article 21.5 of the DSU is used to untangle this disagreement. Before the expiry of the reasonable period of time, the respondent must withdraw or modify the measure that was found to be WTO-inconsistent. In other words, the respondent must take the appropriate implementing measures. It is, however, not uncommon for the original complainant and respondent to disagree on whether any implementing measure is taken or whether the implementing measure taken is WTO-consistent. Article 21.5 of the DSU provides that such disagreement as to the existence, or consistency with WTO law, of implementing measures shall be decided: through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.[309]

The Appellate Body Reports under Article 21.5 are binding. However, the major difference between them and the usual Panel reports is that they enable retaliatory measures. Like 'original' panel and Appellate Body reports, Article 21.5 'compliance' panel and Appellate Body reports become legally binding on the parties only after adoption by the DSB. The DSB adopts these reports by reverse consensus within thirty days after circulation. An important difference between the recommendations and rulings of 'original' reports and Article 21.5 'compliance' reports is that the respondent does not benefit from a reasonable period of time to implement the recommendations and rulings of Article 21.5 reports. Immediately after the adoption of these report(s), the complainant can request

[306] Valerie Hughes, Special challenges at the appellate stage: a case study in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 82

[307] Valerie Hughes, Special challenges at the appellate stage: a case study in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 82

[308] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 292

[309] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 293

authorisation from the DSB to suspend the application of concessions or other obligations to the respondent.[310]

If within the provided time period, the recommendations are not implemented and the negotiation between the parties does not fulfill the expectations, the DSB can authorize the suspensions of the obligations for the complainant. If the respondent fails to implement the recommendations and rulings correctly within the reasonable period of time agreed by the parties or determined by an arbitrator, the respondent will, at the request of the complainant, enter into negotiations with the latter party in order to come to an agreement on mutually acceptable compensation. If satisfactory compensation is not agreed upon within twenty days of the expiry of the reasonable period of time, the complainant may request authorisation from the DSB to suspend the application to the respondent of concessions or other obligations under the covered agreements. In other words, it may seek authorisation to retaliate. The DSB must decide on the authorisation to retaliate within thirty days of the expiry of the reasonable period of time.[311]

The compensation usually increases in some trade areas. Compensation could take a variety of forms, including the provision of enhanced access to the market of the responding Member (either in the same or an unrelated sector) or cash compensation.[312]

While the retaliation is the last resort, it has its limits. The most important limit is set out in Article 22.4 of the DSU:

'The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.'

Thus, the amount of authorized retaliation cannot exceed the level of 'nullification or impairment' of WTO benefits to the complainant caused by the responding Member's WTO-inconsistent measure.[313]

Due to the fact that, the developing countries face many struggles, the DSU provided some special provisions for them in order to overcome the difficulties they encounter in the WTO Dispute Settlement system more easily. Namely, there are rules in Article 8.10, Article 21.2, Article 21.7, Article 24, and Article 27.2.

Article 24.1 of the DSU provides that situation of least developed countries should be taken in regard. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member.[314] Furthermore, this Article calls for the restrain in demanding of the retaliation measures by the complaining parties.

Article 27.2 of the DSU constitutes special obligations for the Secretariat to provide special help to developing countries if requested. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members.[315]

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[310] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 295

[311] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 296

[312] Brendan McGivern , Implementation of panel and Appellate Body rulings: an overview in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 104

[313] Brendan McGivern , Implementation of panel and Appellate Body rulings: an overview in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 106

[314] Article 24, DSU

[315] Article 27.2, DSU

There are numerous difficulties that the developing countries face when they want to start the dispute settlement. The developing countries usually do not have enough resources. Money presents just one of the problems. Human resources such as experts are much more available for the developed countries. The developed countries, when in the role of a complainant, have more experience and a wiling private sector to fund their disputes

Politically, there is a lot of pressure on the developing countries. Pursuing a dispute can raise internal debate and influence governmental institutions and individuals within those institutions. Moreover, with the limited legal knowledge of the WTO provisions, the fulfillment of the WTO obligations is harder. Furthermore, the countries with the economies that are not diversified cannot spread the cost effectively. Regarding this, the countries with fragile economies are afraid to enter into dispute.

With the idea that the developing countries should be enabled to fully participate in the dispute settlement system and assert their right and fulfill the obligations under the WTO Agreements, the Advisory Center on the WTO Law (ACWL) was established. It enabled legal assistance to the developing countries. Despite the fact that the ACWL is not part of the WTO one of its main functions is giving credibility to the WTO Dispute Settlement system. Effective legal assistance for developing-country Members in dispute settlement proceedings is given by the Geneva-based Advisory Centre on WTO Law (ACWL). The ACWL is an intergovernmental organisation, fully independent of the WTO, which functions essentially as a law firm specialising in WTO law, providing legal services and training exclusively to developing-country and economy-in-transition members of the ACWL and all least-developed countries. The ACWL provides support at all stages of WTO dispute settlement proceedings at discounted rates.[316] The ACWL support through its legal advice and training in the WTO Law are of priceless significance for the developing countries.

[316] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 301

Conclusion

The purpose of this thesis is to show the holistic approach of the WTO and its relation with the developing countries. The international trade has developed through the years, especially since the mid of the last century. The genesis of the GATT was complex and, although the GATT was a legal agreement with the purpose to eliminate trade barriers it has paved the way for establishment of the World Trade Organization. In addition, the GATT gave a legal basis for the WTO complex legal system.

The principles of the WTO such as non-discrimination, reciprocity, the enforcement of obligations, and transparency have shown so far as the strong guaranty for the international trade. As far as the objectives and functions are concerned, their aim for raising the standard of living, ensuring the full employment and the expansion of the production and trade with the care of sustainable development and the preservation of the environmental biodiversity seem more than justified. The primary function of the WTO is to provide the trade platform for its Members through common institutional frame work. With its main bodies, the WTO is able to conduct its functions and its objectives. Although it is not the highest body in the hierarchy, it can be said that the WTO Secretariat along with the Director-General has the main role in making sure that the WTO functions are properly conducted.

Upon the completion of the WTO organization, the Doha Round commenced in 2001 and it had numerous effects on the world trade. The developed countries and their needs were the major issue at the Doha Round. The whole round was named the Doha Development Round or the Doha Development Agenda because of the questions it raised. However, when we look at the achievements of the Doha Round, we cannot overlook the previous rounds, especially the Uruguay Round. Although the Uruguay Round had the intention to integrate the developing countries into the international trade, it also revealed some problems of the international trade; in particular, the agricultural reform and the integration of the developing countries into the global trading system. Furthermore, one of the major frustrations of the developing countries was the undemocratic process and their lack of presentation in the “Green Room” meetings.

The Doha Round intended to change all this and give more opportunities to the developing countries. While the developing countries were sceptic towards the new round the DDA put the issues of the developing countries at the first place. Not only did the DDA advocate further trade liberalization, but it also gave the interpretation of some certain agreement, for example, the TRIPS in order to enable the developing countries to address its medical issues.

Moreover, the DDA covered a broad range of topics and there were, naturally, some disagreements between the Members. These disagreements between the developed and the developing countries reached its pinnacle in Cancun. The major issues were the agricultural reform and the so called Singapore issues. Finally, with the efforts and the engagement of the WTO Secretariat which produced the Derbez text and after the July Package, which is a non-binding framework, the negotiations were able to go further.

US-Shrimp case was important because the Appellate Body questioned the 21.5 Ruling. The conclusion was reached that a multilateral agreement can invoke Article XX.g GATT regardless of whether the agreements are concluded or not. Since the US reached the decision that was environmentally based unilaterally, it was seen as imposing the legislation on other territories. The interpretation of the GATT article by the Panel and the Appellate Body with the provision of the DSU

showed that unjustifiable discrimination will not be tolerated. This rule brought new light to the environmental issue.

Another case of paramount importance was the case European Communities Conditions for the Granting of Tariff Preferences to Developing Countries which raised the question, what type of discrimination is permissible and if all the developing countries should be treated equally when applying the GSP scheme. India's challenge relied on the GATT and its relation to the so called Enabling Clause. The Enabling clause presents the derogation from the legal prohibition in GATT Art. I and is allowed. This meant that Europe did not fulfill non-discrimination under the Enabling Clause and thus it violated GATT Art. I. It is shown how the Appellate Body ruling can resolve hard cases and establish important principles. The interpretation of the footnote 3 of the Enabling clause gave another angle of the features of the GPS scheme.

The understanding of the Rules and Procedures Governing the Settlement of Dispute is a milestone for the WTO dispute settlement system. This system ensures effective and swift resolution of the disputes and through its strict rules and procedures it guaranties that the rights of the Members are secured and predictable. The rulings of the Panel and the Appellate Body are based on the DSU and cannot in any way affect the scope of the rights and obligations that are provided in the covered WTO agreement. Through rules and procedures that govern the establishment of the Panel, the Panel procedure and the Appellate Body procedure it is assured that all the interested parties have full participation and in-depth legal evaluation of the disputable issues that are considered and resolved.

The DSU provided the exemption in its articles for the developing countries. Furthermore, to give a fair chance to the developing countries through the effective legal assistance the ACWL was established.

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Abstract

The developing countries are the majority of the Members of the WTO, hence this study wanted to show their important role in the international trade. The WTO and its attitude towards the developing countries have been in the center in of numerous discussions and there are opposed opinions. In this thesis, it was presented the holistic approach of the WTO legal system and its relation with the developing countries. There is no doubt that the developing countries and the least developed countries benefit through its participation in the international trade. What is more, the WTO created special provisions to ease the developing countries participation in the international trade. Thematically, this study gives an overview of the elements of the WTO legal system with the special review of the Doha Round, dispute settlement system and the cases. It seems clear that the principle of equality has been established as much as it was possible through its dispute system and case practice. The Doha Development Round focused especially on the developing issues. This is a Round of extremely difficult negotiations in which it was agreed to implement several trade issues, several development issues, a few non trade issues, and also dispute settlement issues. The WTO system is a platform for negotiation and also a rule based system that gave considerable attention to the developing countries' needs and helped them overcome numerous challenges in the international trade and acquired as much benefits as possible.

Abstract

Die Mehrheit der Mitglieder der Welthandelsorganisation sind die Entwicklungsländer, diese Studie wollte deshalb ihre wichtige Rolle in dem Welthandel zeigen. WTO und ihre Haltung gegenüber Entwicklungsländer waren in der Mitte der zahlreichen Gespräche und es gibt entgegengesetzte Meinungen. In dieser These wurde ganzheitliche Betrachtung der WTO Rechtssystem und ihr Zusammenhang mit den Entwicklungsländer dargestellt. Es besteht kein Zweifel, dass die Entwicklungsländer und die am wenigsten entwickelte Länder durch ihre Beteiligung an Welthandel profitieren. Außerdem, WTO schafft Sonderbestimmungen um den Entwicklungsländer ihre Beteiliugung an Welthandel zu erleichtern. Bezüglich den Themen gibt diese Studie einen Überblick über die Elemente des WTO Rechtssystem und eine besondere Überprüfung der Doha-Runde, System zur Beiligung von Streitigkeiten. Es scheint deutlich, dass Gleichheitsgrundsatz durch Disput System gegründet ist. Doha-Entwicklungsrunde fokussiert insbesondere auf den Entwicklungsthemen. In dieser Runde der extrem schweren Verhandlungen wurde es vereinbart, dass mehrere Handelsfragen, Entwicklungsfragen, einige wenige nicht handelsbezogene Fragen und auch Fragen über Streitbeilegung umgesetzt werden sollen. WTO system ist eine Platform für Verhandlungen und auch ein regelbasiert System. Dieses System hat den Entwicklungsländer große Aufmerksamkeit gegeben und es hat geholfen um zahlreiche Herausforderungen in dem Welthandel zu überwinden und soviel Vorteile zu erwerben.